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February 4, 2009

***VIA PERSONAL DELIVERY AND E-MAIL***

Kevin Adler  
Project Manager  
USEPA-Region 5  
SR-6J  
77 West Jackson Boulevard  
Chicago, IL 60604-3507

**Re:                   Public Comment  
                      Remedial Investigation/Feasibility Study for the Outboard  
                      Marine Corporation Waukegan Harbor Site  
                      (WA No. 042-RICO-0528/Contract No. EP-S5-06-01)**

Dear Mr. Adler:

We submit this Public Comment in our capacity as Special Environmental Counsel for the City of Waukegan, Illinois (the "City" or "Waukegan"), in connection with the Remedial Investigation/Feasibility Study for the Outboard Marine Corporation ("OMC") Waukegan Harbor Site (WA No. 042-RICO-0528/Contract No. EP-S5-06-01)(October 2008) (the "proposed plan"). It is with regret that the City has been compelled to submit these comments. On January 27, 2008, citing the Directive from Chief of Staff Rahm Emanuel<sup>1</sup>, the Memorandum to USEPA employees from USEPA Administrator Lisa P. Jackson,<sup>2</sup> and a January 20, 2009 Resolution passed by the Waukegan City Council,<sup>3</sup> Mayor Richard Hyde requested that the public comment period on the proposed plan be

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<sup>1</sup> *Memorandum For The Heads Of Executive Departments And Agencies*, from Rahm Emanuel, Assistant to the President and Chief of Staff, on the subject of Regulatory Review, dated January 20, 2009. (the attached Chronology, Tab 148, Enclosure 4 to 1/27/09 letter from Mayor Hyde) The Chronology is included with this letter without the referenced attachments. The enclosed DVD includes the Chronology with all attachments in "pdf" format, which have been bookmarked for ease of navigation.

<sup>2</sup> *Memo to All EPA Employees* from Lisa P. Jackson, Administrator-designate, dated January 23, 2009. (Chronology, Tab 148, Enclosure 6 to 1/27/09 letter from Mayor Hyde)

<sup>3</sup> Resolution No. 08-R-8, *A Resolution Respecting The Cleanup Plan For Waukegan Harbor Proposed By USEPA*. (Chronology, Tab 148, Enclosure 1 to 1/27/09 letter from Mayor Hyde)

extended until March 4, 2009. The Mayor and City Council made the request so that the new administration could be afforded time to evaluate the plan proposed by the prior administration, and so that the City and the new administration could engage in a dialogue concerning how to address the contamination in the Waukegan Harbor in a manner that advances the City's redevelopment plan for its downtown and lakefront. Unfortunately, this request was rebuffed by staff at Region 5. The decision to not extend the public comment period evidences a bureaucratic predisposition towards the \$35 million dredging plan which is a holdover from the prior administration. Candidly, as the Mayor points out in his letter, Region 5's decision "can only be characterized as an insubordinate refusal to abide by a Presidential directive." (Chronology, Tab 148, letter from Mayor Hyde, p. 4) Accordingly, these comments are directed to those at USEPA who continue to advocate a position, adopted by the prior administration, which is contrary to the interests of the City and the public at large.

This letter elaborates on the seven general categories of comments on the proposed plan set forth in the City Council's January 20, 2009 Resolution. (Chronology, Tab 143, 1/20/09 City Council Resolution, Attachment 1) As the City Council stated in its Resolution, the question is not whether the City Council desires to cooperate in the cleanup of the PCB contaminated sediments remaining after USEPA's 1992 removal effort, but rather ensuring that the next cleanup is:

- cost effective;
- protective of human health and the environment; and
- advances implementation of the City Council's "21st Century Vision for Waukegan's Downtown and Lakefront" (the "Master Plan").

(Chronology, Tab 143, 1/20/09 City Council Resolution, p. 1) The issues of concern to the City Council relate to factors that USEPA is required to consider and analyze in reaching a decision on a preferred remedial alternative – Cost, Implementability and Community Acceptance. See National Contingency Plan ("NCP"), 40 CFR 300.430(e)(9)(F), (G) and (I), respectively. However, before turning to those issues, it is important to point out that there is agreement between the City and USEPA on the most important criterion for selecting a remedial alternative – protection of human health and the environment. NCP, 40 CFR 300.430(e)(9)(A).

The prior administration's preferred remedial alternative, Alternative 2b, is a \$35 million dredging and on-site consolidation project. There is no dispute that Alternative 5, the \$9.6 million capping alternative, is equally protective of human health and the environment. See RI/FS, Table 6,

Detailed Evaluation of Remedial Alternatives (“Capping of contaminated sediments to achieve a 0.2 ppm PCB SWAC reduces the PCBs that bioaccumulate in fish”).<sup>4</sup> There is also no dispute that remedial caps are a cost effective and proven remedial alternative for contaminated sediments. (Chronology, Tab 99, 3/21/2007 Letter from LFR, Inc. (“We conclude that capping is a cost effective alternative to dredging that is protective of the environment and should be expected to accomplish the objective of delisting the harbor as an Area of Concern”); Tab 100, 4/30/07 Letter from Doug Scott, Director of Illinois EPA, regarding Waukegan Harbor (“Capping is an accepted technological practice that works in many instances, and in theory, could be acceptable for the Harbor”); Tab 122, 12/13/07 USEPA Announces Fox River Capping Plan (USEPA confirms that “based on many tests and past cleanup projects on other bodies of water, the capping method is just as safe as dredging the toxic sediment”).

The City and USEPA are also in agreement on another important issue: remedial action at the OMC North Plant (Plant 2) is a higher priority than addressing the PCB contaminated sediments in the Harbor that remain after USEPA’s first removal action in 1992. USEPA acknowledged this in the September 10, 2007 Record of Decision (“ROD”) addressing the OMC Plant 2 building and the soil and sediment media. The ROD states, “[A]s the building falls into further disrepair it is predicted that the PCBs therein will eventually migrate into the environment.” (p. 13) The City’s maintenance obligations under the June 23, 2005 Supplemental Consent Decree with respect to the roof at Plant 2 end in 2011. (Chronology, Tab 90, 6/23/2005 Supplemental Consent Decree, p. 14, ¶12.b.) Thereafter, as the roof deteriorates, the PCBs inside Plant 2 will be washed by stormwater into the Harbor. The City and USEPA have long known that PCBs in and outside of Plant 2 present a more immediate threat to human health and the environment than the residual PCBs in the Harbor sediments. It would be a colossal waste of money to remediate the residual Harbor sediments (by capping or dredging), only to have the Harbor become recontaminated by the PCBs remaining at the North Plant.

There was consensus on this point at the November 13, 2008 public meeting on the proposed plan. (Chronology, Tab 131, 11/13/2008 Comments by Ray Vukovich, Director of Government Services for the City of Waukegan (the North Plant will recontaminate the Harbor) (Transcript, p. 39)). Kevin Adler, USEPA’s project manager for the OMC Site, agreed that money in

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<sup>4</sup> The President’s authority under CERCLA to place a remedial cap in a navigable channel, and to impose institutional controls to prevent its disturbance by deep draft vessels, is addressed below in our comments on implementability.

the Superfund Program "is in short supply" and that "those pieces of the [OMC NPL] site that have more potential risk to human health and environment would be funded first." Therefore, according to Mr. Adler, demolition and cleanup of OMC Plant 2 and cleanup of the groundwater at Plant 2 should be "ranked above" the cleanup of the Harbor sediments. (Tab 131, Transcript, p. 33) The Waukegan Harbor Citizens Advisory Group ("CAG"), although it neither represents nor speaks for the City, nevertheless agrees that cleanup of the North Plant should be given a higher priority than implementing any remedial alternative for the residual PCBs in the Harbor sediments. (Chronology, Tab 51, 8/22/2002 letter from the CAG to Mayor Hyde expressing concern that cleanup of Plant 2 is necessary to prevent "further contamination" of the Harbor.)

Given the general agreement that the cleanup of Plant 2 has a higher priority than implementation of any remedial alternative for the residual Harbor sediments, and that USEPA presently has no funding for a North Plant remedy (soil or groundwater), we are left with many questions and no answers. Why, at least according to USEPA staff, is there no time for the City and the new administration to talk? Could it be that the real urgency derives from the desire to dredge the Harbor for the benefit of deep draft cargo vessels, and not protecting human health and the environment? (Chronology, Tab 85, 4/16/2004 News-Sun Article reports "Some aldermen say they suspect that the cleanup project is just a way to get the city to swallow a deep dredging project".)

Turning from rhetorical questions for which USEPA has refused to provide answers, we now address those issues of greatest concern to the Mayor and City Council:

- Future Use. The reasonably anticipated future use of the Harbor and Harbor area is for recreational boating and a mix of residential, commercial and open space uses as contemplated by the Master Plan. We will analyze the following three elements of this issue:
  - Existing zoning and re-zoning currently underway demonstrates that the future use of the lakefront generally, and the Harbor area specifically, will be a mix of residential, commercial and open space uses as contemplated by the Master Plan. The use of the Harbor will be dictated by the land surrounding it (not *vice versa*).
  - The trend in land use has been the de-industrialization of the lakefront generally and the Harbor area specifically.
  - The Mayor, City Council and community have demonstrated a sustained commitment to the vision set forth in the Master Plan for the lakefront and Harbor area.

- **Economic Benefit.** The Mayor and City Council are very concerned about the former administration's opinion that the dredging alternative will confer "important redevelopments benefits" on the City. This opinion is unsupported by any data or analysis. Moreover, justifying the dredging alternative on this basis substitutes the judgment of federal staffers for that of the Mayor and City Council on an issue of critical importance to the future of the City.
- **Community Acceptance.** In making a subjective judgment concerning "community acceptance" of a remedial alternative, USEPA should remember that the Mayor and the City Council, not the CAG or any other self-appointed group, are the democratically elected representatives of the residents of Waukegan.
- **Implementability.** The former administration deemed the issues of Future Use and Economic Benefit to be irrelevant. This explains why the former administration gave scant (if any) attention to these issues. Relying on "confidential" legal opinions, the former administration determined that the President did not have the authority under the Superfund statute to place a remedial cap in the navigational channel and impose institutional controls to protect the cap from disturbance by deep draft vessels. By refusing to disclose its analysis of whether the President has the authority to select the \$9.6 million cap alternative (and save the \$25.4 million additional cost of the dredging alternative), USEPA has cut off debate on the issues of Future Use and Economic Benefit. Having concluded in secret that there is a "legal necessity" to dredge, USEPA essentially concludes that there really is nothing else to talk about. Such a constrained reading of the President's authority reflects a predisposition towards the dredging alternative. We will address this issue directly and expose the reason for the "conflicting opinions" to which Mr. Adler referred during the November 13, 2008 public meeting. (Chronology, Tab 131, 11/13/2008 Public Meeting Transcript, p. 18)

## **I. FUTURE USE**

The former administration failed to consult with the City concerning the future use of the Harbor and Harbor area. This is a clear violation of long standing policy and practice when developing RODs for other operable units at the OMC Site. The former administration should only have proposed a remedial alternative for the Harbor after making a future use determination with respect to the Harbor area. (Chronology, Tab 6, 5/1/1995 "Guidance Reuse Assessments: A Tool To Implement The Superfund Land Use Directive", affirmed in a subsequent USEPA Directive dated June 4, 2002) The purpose of the Directive is to "help communities return Superfund sites to productive use." (*Id.*, p. 1)<sup>5</sup> The process is very simple at sites, such as the OMC Site, where the

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<sup>5</sup> On August 16, 2002, USEPA designated the Waukegan an "Environmental Justice Community". According to USEPA this designation was to enhance the ability of USEPA and the City to cooperate in developing properties within the City for the best end uses without significant additional government resources. (Chronology, Tab 50, 8/16/2002 USEPA Correspondence) Candidly, the City has seen little in the way of an "enhanced ability" to implement the Master Plan on the lakefront. The designation by the former administration proved to be nothing more than an effort to pressure the City Council to accept the ill-conceived proposal to dispose of the Harbor sediments at the Yeoman Creek Landfill, and played no role in

City has already made future land use decisions. (*Id.*, Attachment 1, p. 1) As the City has “already determined and documented” the future use of the lakefront and Harbor area, and future use of the lakefront and Harbor area was “certain” (not “relatively certain”), there was no need for the former administration (had it elected to follow Agency policy and past practice at the OMC Site) to undertake its own future use assessment, based on development trends and other variables. (*Id.*, Attachment 1, p. 2). We could stop with a simple description of the Master Plan. But we will go further and describe land use trends and the community’s commitment to realizing the vision in the Master Plan.

a. Agency Policy And Past Practice At The OMC Site With Respect To Future Use Determinations

Not only did the prior administration ignore the Superfund Land Use Directive, it deviated from past practice in making a future use determination during the RI/FS stage when proposing remedial alternatives at every other operable unit at the OMC Site. (Chronology, Tab 123, 5/13/08 Second Amended Complaint, Exhibit A – listing of operable units 1, 2, 3 and 4 at the OMC Site).

- Coke Plant property.<sup>6</sup> On November 6, 1998, in accordance with the 1995 Land Use Directive, USEPA issued a Feasibility Study for the Coke Plant property and made a determination that the "future use" of the Coke Plant property would most likely be "industrial". (Chronology, Tab 8, 11/16/1998 Feasibility Study, Appendix 3-A to the FS Study, Future Land Use Considerations) On September 30, 1999 USEPA issued a ROD for the Coke Plant property (Chronology, Tab 12) and stated explicitly that the industrial/commercial cleanup levels for contaminated soils were based on the assumption that the "Future land use at the Site is likely to be commercial or industrial." As will be explained below, the City did not agree with the Agency’s decision. But at least the Agency sought to comply with the 1995 Land Use Directive.
- On April 1, 2006 USEPA issued a REMEDIAL INVESTIGATION REPORT for the former OMC North Plant (Plant 2), now owned by the City. In contrast to its 9/20/1999 ROD for the Coke Plant property, and consistent with the findings in the Explanation of Significant Differences (“ESD”) in connection with the Coke Plant property issued 9/28/2004,<sup>7</sup> USEPA concluded that the anticipated future use of the North Plant property is, as provided in the City’s Master Plan, mixed use residential and recreational, not industrial. (Chronology, Tab 94, 4/1/2006 REMEDIAL INVESTIGATION REPORT OMC PLANT 2 – Refer, for example, to the following

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resolving the conflict between the City and USEPA regarding the future use of the Coke Plant property (discussed below). So it comes as no surprise that the City’s designation as an “Environmental Justice Community” did not prompt the former administration to abide by the requirements of the 1995 Land Use Directive.

<sup>6</sup> The "Waukegan Coke Plant", "Waukegan Manufactured Gas and Coke Plant Site" or "Coke Plant property" is now referred to by the City as the "Peninsula Site". For the purposes of these comments we refer to this property, now owned by the City, as the "Coke Plant property".

<sup>7</sup> The ESD can be found in the Chronology, Tab 87, and is discussed in further detail below.

pages of the RI Report: vii, viii, TABLE ES-1 (Summary of Estimated Health Risks for Site Chemicals), 3-15, 3-21, 3-29, 4-9, 4-11, 5-2, 5-3 and 5-5.) USEPA made its finding not only with respect to the North Plant, but also as to the remaining land in the "immediate harbor area". In making this future use determination, USEPA adhered to the Waukegan Lakefront - Downtown Master Plan and supporting documents prepared by Skidmore, Owings & Merrill, LLP (the "Master Plan"). (Chronology, Tab 79, 7/1/2003 "A 21st Century Vision for Waukegan's Downtown and Lakefront") According to the RI Report, "The Master Plan and documents provided by the City of Waukegan were reviewed with respect to the anticipated future land use of the OMC Plant 2 and surrounding properties." (§2.1.2 Future Land Use, p. 2-1, Emphasis Added). See also FEASIBILITY STUDY REPORT for OMC Plant 2 dated December 2006 (Future Use, p. 1-7); ROD Summary for OMC Plant 2, "EPA Proposes First Cleanup Plan for the Outboard Marine Corp., Inc. Plant 2 Site" (December 2006)(acknowledging future residential use); Record of Decision issued for Plant 2 building, soil and sediment media dated 9/1/2007, Section VI.F ("The city has published its master plan for redevelopment ( Figure 7) on its website and officials have recently stated that in another 15-20 years perhaps "8000-10,000 people will be living on the lakefront where no residents are living now").

In sharp contrast to these past precedents, the former administration made no determination with respect to future use of the Harbor in connection with the selection of the remedial alternative at issue here. The total extent of USEPA's future use analysis was to point out that the Harbor has been designated as a navigable channel and therefore, apparently, is and will always remain an industrial harbor. (Chronology, Tab 129, October 2008 Feasibility Study, p. 3-6) The central question of whether there will be a continued demand for deep draft vessels from the little industry that remains on the Harbor, or whether the reasonably anticipated future use of the Harbor will be as a "recreational harbor" as contemplated by the City's Master Plan, has been ignored. The Feasibility Study does not contain a single reference to the Master Plan, the 1995 Land Use Directive, or to any consultation with "local land use planning authorities" and "appropriate officials", such as Mayor Hyde, his staff or the City Council.

The fundamental question remains unanswered – how did the former administration determine the "reasonably anticipated future use" of the submerged land in Waukegan Harbor without considering the future use of the land surrounding the Harbor? (Chronology Tab 137, 1/2/2009 City Letter to USEPA, p. 3) The USEPA Fact Sheet, "EPA Proposes Cleanup Plan For Harbor Pollution", is similarly silent on the future use of the Harbor area. Yet while the former administration did not think it appropriate to consult with the Mayor or his staff, there was extensive consultation between USEPA and Harbor industry concerning the remedial alternative for the Harbor throughout the summer of 2008 (before making a formal announcement in October 2008 of the proposed plan). (Chronology, Tab 134, 12/2/2008 City Letter to USEPA, p. 4)

The Mayor, noting the disparity in the level of communication between the former administration and Harbor industry as compared to the absence of communication with his office, had this to say to Mr. Karl at Region 5:

I regret your decision to rebuff the City's request for a dialogue concerning the harbor and the future of the City's lakefront. In effect, your letter states such a dialogue is both unnecessary and would be unproductive. Evidently, it is your view that anything USEPA and the City had to say to one another concerning the harbor was said during our previous (unsuccessful) effort to reach agreement on a dredging project that would have been funded, in part, under the Great Lakes Legacy Act ("GLLA"). I strongly disagree with any perspective that discounts the possibility of achieving consensus through a dialogue that is long overdue.

As you know, this issue of "what to do about the harbor" was referred to the Superfund program. The Agency made the referral after rejecting conditions requested by the City Council in order to proceed with a GLLA dredging project. You will recall that the stumbling block in reaching an agreement was how to clean up the harbor in a manner that advanced the City's Downtown and Lakefront Master Plan ("Master Plan"). The position of the Agency under the prior administration was stated succinctly in an August 22, 2007 press release. As far as the Agency was concerned, realization of the goals enunciated by the City Council in the Master Plan was irrelevant and "unrelated to the cleanup of the harbor." While the Agency may have had limited authority under the GLLA to consider the goals of the Master Plan, once referral occurred, as addressed in our prior correspondence on this issue, an entirely new set of regulatory and procedural requirements came into play under the Superfund Statute. ( Chronology Tab 148, 1/27/09 Letter from Mayor Hyde)

b. Future Use As Documented and Determined By The Waukegan City Council

Had the former administration consulted with the Mayor and his staff, it would have received the documents and relevant determinations that have been made by the City Council with respect to the future use of the lakefront and Harbor area. It would have been told the story of how a city goes about the task of reinventing itself.<sup>8</sup> This is that story:

- The process of planning for the de-industrialization of the lakefront did not begin with the arrival of the Urban Land Institute ("ULI") in July 2001 (see discussion below). The Comprehensive Plan adopted by the City Council in December 1987 first established the goal of "redevelopment of the lakefront for residential, recreational and commercial uses". The 1987 Plan also provided that:
  - The lakefront industrial areas provide an opportunity for significantly affecting the character of the City as a whole as it changes to more recreational and residential uses;

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<sup>8</sup> Although, given the determinations in the context of the Coke Plant ESD and North Plant ROD discussed above, USEPA clearly was and is aware of the future use of the subject areas. USEPA has simply chosen to ignore that information in the present context.



- Related recommendations are made for expanding the lakefront plan to include more residential apartment development adjacent to the harbor expansion along with mixed use commercial development for residents and visitors to the area;
- The Plan provides for...Harbor Homes in the proposed Lakefront development; and
- New industrial uses must be established near the Airport, on the western edge of the City, to achieve an expanded industrial tax base to take the place of the older, heavier industries which are located on the lakefront.

(Chronology, Tab 4, 12/1/1987 Waukegan Comprehensive Plan Report.)

- In January 1996, the City Council retained CityVision, a consulting firm, to facilitate planning for the redevelopment of the lakefront and downtown.
- On July 1, 1997 the City Council amended the City Zoning Ordinance to establish 60 feet as the maximum permitted building height. This amendment applied to new industrial uses proposed for the lakefront and reflected a clear new direction in discouraging new industrial uses on the lakefront.
- On July 7, 2000 the City Council adopted a 6-month moratorium on the development of electrical generating power plants on the lakefront.
- On December 20, 2000 the Waukegan Port District ("WPD") unanimously adopted a Resolution that noted the decline of industry on the lakefront and recommended undertaking a joint study with the City of Waukegan into the feasibility of residential development on the lakefront, including on land owned by the Port District around the Harbor. (Chronology, Tab 14, 12/20/2000 WPD Resolution)
- On July 1, 2001 the Waukegan City Council formally invited the ULI Advisory Panel to the City to address, among other questions, whether the City should attempt to retain and attract new industry to the lakefront and Harbor area, or whether the City should move in a new direction, and embrace a post-industrial future for the lakefront and harbor area. ULI is a renowned nonprofit, nonpartisan research and educational institute dedicated to addressing issues of urban renewal, smart growth and brownfield redevelopment.
- On November 13, 2001 the City Council passed an ordinance imposing a 1 year moratorium on all permits for new development on the lakefront.
- Following the sudden death of Mayor Dan Drew on the eve the arrival of the ULI Panel, Alderman Richard Hyde was appointed acting mayor by the Waukegan City Council. The News-Sun reported, "As the city picks up the pieces and moves on in the aftermath of Dan Drew's death, the first order of business for many is the upcoming visit by the organization charged with crafting a master plan for lakefront revitalization." (Chronology, Tab 29, 2/13/2002 News-Sun Article)

- On February 22, 2002, Bill Hudnut, the former Mayor of Indianapolis and Senior Fellow of the ULI, delivered the ULI Panel recommendations on the lakefront. The Harbor area was identified as the center of the New Harbor Zone, a mix of residential, commercial and recreational uses. The Chicago Tribune reported that, "Waukegan told [by ULI Panel] to ban factories at shore." (Chronology, Tab 32, 2/23/2002 Chicago Tribune Article) On March 12, 2002, Hudnut presented the Executive Summary of the ULI Advisory Services Panel findings and recommendations at a public meeting. The Panel recommended the "de-industrialization" of the lakefront and stated, "With leadership, diligent effort, and partnerships among the public, private, and non-profit sectors, the panel urged the City to pursue 'the polished gem' on the lakefront envisioned by the late Mayor Drew." (Chronology, Tab 34, 3/12/2002 Executive Summary)
- On March 21, 2002, following the recommendation by the ULI Panel, the City Council enacted a 1% increase in sales tax to fund downtown/lakefront redevelopment. (Chronology, Tab 36, 3/21/2002 Ordinance)
- On July 12, 2002, in follow-up to the oral presentation of the ULI Panel findings delivered by Hudnut on February 22, 2002, ULI issued the Final ULI Report - ULI Advisory Services Panel Waukegan Panel Report. The Report concluded: "The best direction that marvelous lakefront can take is to shed its old industrial uses and take steps to support up to date and in-demand residential, recreational, and non-polluting commercial uses. In short, the lakefront should become a harbor city. That transformation is the parcel's vision. With leadership, diligent effort, and partnership between public and private sectors, the lakefront district can become the 'polished gem' Mayor Drew predicted." (p. 39) The Report stated that, "Heavy industry is no longer the highest and best use for Waukegan's lakefront and should be phased out." (p. 10). The Report specifically concluded that land around the Harbor should be residential (p. 27). The Report also recommended that the City produce a detailed master plan for the downtown and lakefront (p. 30). (Chronology Tab 45, July 22, 2002 Final ULI Report) One week later, on August 1, 2002, the City issued Requests for Proposals for a master planner for the downtown and lakefront in follow-up to the recommendation of the ULI Panel. (Chronology, Tab 47, 8/1/2002 Request for Proposals)
- The City recognized that it could not rely on USEPA and the Illinois Environmental Protection Agency ("IEPA") to require polluters to clean properties to a residential standard that complies with the Master Plan. Indeed, in some cases USEPA had sided with polluters in requiring a lesser cleanup to industrial standards. The City Council therefore enacted a Solid Waste Nuisance Ordinance. The Ordinance mandates that polluters pay for cleaning property located within the "Lakefront Redevelopment Zone" to residential standards. The Ordinance declared as a "public nuisance" all soil within Lakefront Redevelopment Zone contaminated above residential cleanup standards. The purpose of the Ordinance is to ensure that lakefront properties are cleaned to a level that will allow land use contemplated by the Master Plan (as opposed to less stringent industrial cleanup standards). On 7/7/2004 the Ordinance was amended to extend the boundary of the Lakefront Redevelopment Zone to the northern boundary of the City. (Chronology, Tab 56, 10/21/2002 Ordinance)

- On November 12, 2002 the City Council appointed a 10-person "Harbor City Renaissance Commission" to assist City officials through the lakefront redevelopment process. (Chronology, Tab 57, 11/12/2002 News-Sun Article)
- On November 18, 2002 the City Council extended the November 19, 2001 moratorium on lakefront development for an additional year, noting the City's recent acquisition of the Coke Plant property (OMC Site Operable Unit #2) and the findings and recommendations of the ULI Advisory Panel. (Chronology, Tab 58, 11/18/2002 Ordinance)
- On November 26, 2002 the Harbor City Renaissance Commission conducts final interviews and unanimously recommends that City Council select Skidmore Owings & Merrill as master planner for the downtown and lakefront. On December 16, 2002, the City Council approved a contract with Skidmore Owings & Merrill to serve as master planner for the downtown and lakefront. On December 31, 2002, the News-Sun includes the City's aggressive pursuit of its effort "to transform the lakefront from a post-industrial hodgepodge into a residential and recreational haven" as one of "Lake County's Top 10 Stories for 2002." (Chronology Tab 60, 12/31/2002 News-Sun Article)
- On February 28, 2003, Skidmore Owings & Merrill issued its "Summary Assessment - Waukegan Lakefront - Downtown Master Plan/Urban Design". The assessment rejected an industrial/commercial use for the lakefront. (Chronology, Tab 68, 2/28/2003 Summary Assessment)
- On May 9, 2003, Mike Higbee, a member of both the ULI Services Panel, principal in Development Concepts, Inc., and former City Administrator during the term of Mayor Hudnut, visited Waukegan with a member of the Skidmore Owings & Merrill team. In discussing the Coke Plant property and North Harborfront. Higbee noted that: "A market for residential and lakefront commercial development is strongly evident once the land has been positioned to receive it." Higbee concluded that, "A transition from industrial and semi-industrial uses to residential and mixed-use development in the North Harborfront reflects the desirability and hence potential value of the immediate lakefront and lake view properties. Development of this area with medium-density residential and mixed-use will also contribute significantly to enhancing the downtown viewshed of the lakefront." (Chronology, Tab 73, May 9, 2003 Higbee Memorandum)
- In July 2003 the City Council unanimously adopted "A 21st Century Vision for Waukegan's Downtown and Lakefront" (the "Master Plan"). A depiction of the property currently occupied by National Gypsum (one of three industries for who's benefit USEPA now wants to spend an additional \$25.4 million on a dredging project) is designated for "Marina-Related Use", "Future Boat Launch" and "50' Continuous Public Edge" (Master Plan, p. 21) (Chronology, Tab 79, 7/1/2003 Master Plan) The text accompanying the depiction of the North Harbor property currently occupied by National Gypsum states, "With the closing of key manufacturing plants, and reduced dependence on lake-based shipping, development adjacent to Waukegan's harbor will shift to a more diverse mix of recreational, residential and commercial uses. The Master Plan expands and enhances this evolution by proposing mixed-use, marina-based development that will re-define Waukegan's harbor for the next century." (Master Plan, p. 21) Another rendition of the Harborfront and North Harbor depicts the property currently occupied by

the National Gypsum wallboard plant as being replaced with a marina and a mix of residential and commercial uses. (Master Plan, p. 23) The text describing the Harborfront and North Harbor further states that "material storage, distribution and industrial operations" will be encouraged to relocate away from the North Harbor after 5 years. (Master Plan, p. 24)

- In March 2005 the City Council adopted "Design Guidelines Waukegan Lakefront - Downtown Master Plan". The purpose of the Guidelines is to (1) define the overall design approach for districts and building types; (2) confirm community goals for the design and quality of new development; (3) establish clear rules for neighborhoods, blocks, lots, buildings, streets, and open spaces; (4) provide clarity to private development interests about the physical and design framework within which they will be required to work; (5) provide confidence to private development interests that neighboring properties will follow common standards; (6) provide a promotional tool for inclusion in requests for proposal; and (7) unite the city in its evaluation of development proposals. With respect to the Harborfront, where deep draft vessels deliver commodity products, the Design Guidelines are specific and clear: "Existing light industrial uses throughout the [Harborfront] district must meet city, state, and local performance standards related to noise, odor, dust and emissions. In the long term, these uses should be phased out or relocated as they may be incompatible." (p. 18) With respect to the North Harbor, the future use of the National Gypsum property is designated as "Marina-related", not industrial. (Graphic at p. 23) (Chronology, Tab 89, 3/1/2005 Design Guidelines)
- On August 1, 2005 the City Council enacted Ordinance No. 05-O-113, a text amendment creating a downtown and lakefront "overlay district" and map amendment to the Zoning Ordinance applicable to all properties located within the overlay district. The overlay district consists of the downtown and entire lakefront (including the Harbor area). The ordinance applies the Design Guidelines to all projects proposed for downtown and on the lakefront (and grants staff limited discretion to deviate from the Guidelines). (Chronology, Tab 91, 8/1/2005 Overlay District Ordinance)
- On May 19, 2008 the City Council enacts Ordinance No. 47, prohibiting the use of groundwater as a potable water supply within the district. This was to facilitate residential redevelopment in the North Harbor district (around the Harbor) (Chronology, Tab 124, 5/19/2008 Ordinance)
- On January 16, 2009, the News-Sun reported that the City Council "advances lakefront ordinances", as the first step in amending the City's Zoning Ordinance to conform the entire lakefront, including the Harborfront and North Harbor, to a zoning classification consistent with the Master Plan. (Chronology, Tab 141, 1/16/2009 article) In a Memorandum dated January 27, 2008, Russ Tomlin, Director of the City's Department of Zoning and Planning ("Tomlin"), stated that:

The balance of the lakefront is anticipated to be formally rezoned in the first half of 2009. The process to approve a new ordinance and map was initiated over two years ago at an administrative level. The public process was launched on March 3rd, 2008 when Council approved the creation of and appointments to the Waukegan Zoning Commission. That Commission is

charged with the review of any and all changes to the Zoning Ordinance and Zoning Map. (Chronology, Tab 149, 1/27/2009 Tomlin Memo, pp. 1-2)

c. Land Use Trends on the Lakefront

The trend of land use development over the past thirty years (or more) has been toward the de-industrialization of the lakefront. Tomlin succinctly stated the issue as, "The question is not whether heavy industry will return to the lakefront, but what will replace the industry that has left." (Chronology, Tab 52, 9/13/2002 Staff Report) The following summarizes some of the events that have been occurring on the lakefront:

- On August 6, 1999 an appraisal was conducted of all properties then owned on the lakefront by OMC (the North Plant, Coke Plant property and South Plant). The appraisal provided a candid assessment by a land use professional of why industry has left and will never return to the lakefront. The appraiser explained why the lakefront is a "marginal" location for industry and has "impaired utility" for industrial uses: the lakefront is too distant from the interstate highway system, where modern "big box" type facilities want to be located. The City, of course, reached the same conclusion in 1987 when the Comprehensive Plan concluded that industry on the lakefront is moving to the west side of the City to be near the airport and interstate highway system. Having reached this conclusion, the appraiser answered Tomlin's question of "what will replace the industry that has left": residential and recreational uses. OMC foretold the conclusions of the ULI Panel by three years. The principal conclusions of the OMC appraisal are that:
  - "The marketability is further constrained by the subject's marginal industrial location and its impaired functional utility. The bottom line is that most modern industrial users prefer versatile 'big box' type facilities in newer industrial parks with nearby expressway access. Given the limited market appeal of the subject property, we feel that, if the property were offered for sale, it could face a protracted marketing period, possibly extending several years." (Chronology, Tab 11, 8/6/1999 S. Siegel & Associates, Ltd. Appraisal, p. 60)
  - "We think it is unlikely that an industrial user from elsewhere would want to relocate to the subject facility, given its marginal location and its functional deficiencies." (*Id.* at 61)
  - Again foretelling the conclusions of the ULI Panel, the appraiser concluded that the "highest and best use" of the OMC properties "would involve a government agency demolishing the existing improvements and to redevelop the site with an 'open space' recreational use." (*Id.* at 64)
- In 2000, shortly after the Siegel appraisal, Johns Manville announced the planned demolition of its large, and long closed, industrial facility on the lakefront.
- On December 22, 2000 OMC filed for bankruptcy. This was a seminal date in the history of lakefront, and the Harbor area in particular. The bankruptcy occurred after the

findings in the December 1987 Comprehensive Plan; after the preliminary work by CityVision (retained by the City Council in January 1996); and spurred the City Council to invite the ULI to Waukegan.

- On February 5, 2001, Bombardier entered into an agreement with the OMC Bankruptcy Trustee to purchase the assets of the OMC engine division. Bombardier acquired the South Plant property but declined to take title to the Coke Plant and North Plant properties. On April 19, 2001, executives from Bombardier informed the Mayor and City Council of their decision to move OMC's lakefront manufacturing operations to Wisconsin.
- On November 1, 2001 the OMC Bankruptcy Trustee filed a motion seeking bankruptcy court approval to "abandon" the North Plant. The motion explained that the Trustee had not been able to attract buyers for the industrial property (which is not surprising in light of Siegel's findings with respect to the property's "marginal industrial location" and "impaired functional utility"). In short, the motion stated that the property was of "inconsequential value" and a "burden" on the assets of the bankruptcy estate. (Chronology, Tab 23, 11/1/2001 Motion) On February 15, 2002, the Bankruptcy Trustee filed an amended motion to abandon the Coke Plant property as well (in addition to the North Plant). (Chronology, Tab 31, 2/15/2002 Motion)"
- On September 13, 2002, Tomlin submitted the Staff Report to the Waukegan Development Commission in support of re-zoning the Coke Plant property from industrial to residential. Tomlin explained that the future use of the Coke Plant property should be dictated by sound land use principles, not the financial considerations of the parties who caused the pollution. Noting the "clear trend towards the de-industrialization of the lakefront", Tomlin stated to the Commission: "The attorneys for General Motors and North Shore Gas, the companies that polluted the Coke Plant property, object to the rezoning of the property. Staff finds that the arguments raised by the polluters are not relevant to the standards set forth in Section 3.10 of the Ordinance. Persons causing pollution do not have a basis to object to the rezoning of the property they pollute. The zoning of the property in the City of Waukegan should be governed by the Zoning Ordinance and the 1987 Plan, not the financial considerations of the polluters of the property. Staff is unable to find any support in the Zoning Ordinance or 1987 Plan for the radical proposition that polluters have a right to dictate the future use of property they pollute - particularly, where the restrictions the polluters seek to impose frustrate the goals and objectives of the Zoning Ordinance and the 1987 Plan." Tomlin went on to explain that even before the bankruptcy of OMC the trend of development on the lakefront was disinvestment in industrial uses. Apart from the applications to locate the Kinder Morgan power plant and NSSD sludge incinerator on the lakefront (both of which were rejected by the City Council), the City had not received a single application to expand or locate an industrial facility on the lakefront in the preceding five years. Tomlin concluded that, "We see a clear trend towards the de-industrialization of the lakefront. The question is not whether heavy industry will return to the lakefront, but what will replace the industry that has left. This is the very question the City Council asked the ULI Advisory Panel, a nationally renowned panel of experts, to address. The ULI Panel Recommendation lays the groundwork for a comprehensive lakefront redevelopment plan." (Chronology, Tab 52, 9/13/2002 Staff Report)

- On December 5, 2008, Tomlin issued a Staff Report to the Waukegan Development Commission concerning a request for a conditional use permit/overlay district approval. (Chronology, Tab 91, Ordinance No. 05-O-113) The Staff Report recommended approval of a Mixed Use Residential use consisting of Courtyard Homes, Single Family Residences and Town House Lakeview Condos in the area designated as the "South Lakefront" in the Master Plan and Design Guidelines. (Chronology, Tab 135, 12/5/2008 Staff Report)
- On January 27, 2008, Tomlin rendered a professional opinion concerning the reasonably anticipated future use of the North Harbor, Harborfront and Harbor area. Tomlin stated that, "It is my professional opinion that the reasonably anticipated future use of the North Harbor will be mixed use, predominated by residential as defined by the Master Plan." (Chronology, Tab 149, 1/27/09 Staff Report)

d. ULI Told The City It Would Not Be Easy

This last section on the reasonably anticipated future use of the Harbor area addresses a factor not listed in the Superfund Land Use Directive: backbone, single minded determination, focus, stubbornness, commitment, audacity, hope, gumption, nerve, or, if you like, chutzpah. Of all the factors in assessing the "reasonably anticipated future use" of the lakefront and Harbor area, the single most important factor is whether the Mayor, City Council and residents have shown, and can sustain, in good times and bad, an unwavering commitment to the realization of the bold vision set forth in the Master Plan. Is it real, or is it just hype? When Bill Hudnut delivered the findings of the ULI Panel to the Mayor, City Council, residents and Greater Chicago on February 22, 2002, he warned all listening that it would not be easy to achieve 'the polished gem' on the lakefront. Mayor Hudnut could not have spoken more directly to the issue: the realization of the City's vision for the lakefront would be difficult to achieve and should not be undertaken by the faint of heart. So let us review whether the Mayor and City Council have risen to the challenge set before them seven years ago.

i. Coke Plant property

- On January 10, 2001 the OMC bankruptcy court entered an Order providing for the expedited sale of all OMC assets by February 5, 2001. This did not bode well for the City. Given what the City (and everyone else) knew about the "marginal utility" of the OMC properties, there was real concern of a "fire sale" or worse on the North Plant, and the Coke Plant property surrounded by a barbed wire fence. Swift, aggressive action had to be taken. On January 19, 2001 the City filed its Objection to the bankruptcy court's 1/10/01 Order, arguing, among other things, that a "fire sale" approach to the sale of the OMC lakefront property would result in the abandonment of the most contaminated property. On January 30, 2001 Larsen Marine, with backing and promises of indemnification from General Motors and North

Gas, the polluters of the Coke Plant property, submitted its bid to acquire the property. The battle for control of the Coke Plant property between the City and the polluters then commenced. On February 28, 2001 the City submitted comments on the plan put forth by the polluters. (Chronology, Tab 16, 2/28/2001 City Comments) On November 12, 2001 the City Council directed legal counsel to secure the OMC properties, by eminent domain if necessary. (Chronology Tab 24, 11/12/2001 Ordinance; Tab 26, 11/19/2001 City's Objection)

- Bill Muno at USEPA tried to facilitate a compromise between the City and the polluters. (Chronology, Tab 30, 12/14/02 Muno Letter) The City indicated that it might be willing to accept a cleanup to a "recreational" standard (as opposed to a "residential" standard). The polluters, however would not compromise – they insisted on an industrial cleanup and dismissed the City's vision of a redeveloped lakefront as an illusion and political fad. They, too, for self-serving reasons embraced the motto, "once industrial, always industrial". On March 5, 2002 the City announced that it would take the Coke Plant property by eminent domain. (Chronology, Tab 33, 3/5/2002 City's Motion) The polluters responded by striking a deal with the Bankruptcy Trustee to acquire the property (through Larsen Marine) and impose a "deed restriction" that would have forever limited the Coke Plant property to the very industrial uses Siegel had already determined were of "marginal utility". (Chronology, Tab 11, 8/6/1999 S. Siegel & Associates, Ltd. Appraisal, p. 60; Tab 35, 3/21/2002 Trustee's Motion)
- The future of redeveloping the Coke Plant property in accordance with the ULI Panel recommendations and what would become the Master Plan hung in the balance. The City demanded a hearing on its motion to move forward with its eminent domain action and threatened to proceed with the environmental claims filed against the Bankruptcy Estate and all who might "come to own" the OMC property. (Chronology, Tab 17, 4/11/2001 RCRA and TSCA Notice) Ultimately, the City was able to convince the Trustee to do the right thing, and sell the property to the City. On April 23, 2002 the bankruptcy court approved the sale of the Coke Plant property to the City without conditions (*i.e.*, the City was not required to agree to an industrial use restriction). (Chronology, Tab 39, 5/10/2002 Sales Contract). The polluters filed a motion arguing that their cost of cleaning up the Coke Plant property would increase if sold to the City. Judge Barliant rejected this argument, ruling that polluters have no right to control the future use of property they pollute. (Chronology, Tab 40, 6/10/2002 Order) The City took title to the Coke Plant property on June 24, 2002. (Chronology, Tab 41, 6/24/2002 Deed) This did not end the debate.
- On July 15, 2002 the City began the process to rezone the Coke Plant property from an industrial to a residential zoning classification. (Chronology, Tab 44, 7/15/2002 Application) On August 8, 2002 USEPA advised the City that the residential zoning classification was inconsistent with the ROD, which assumed a future industrial use. (Chronology, Tab 49, 8/8/02 USEPA Letter) On October 7, 2002 the City Council voted to approve the rezoning.



(Chronology, Tab 53, 10/7/2002 Ordinance) A full report of these events was provided to City residents a few months later at the first community forum held during the development of the Master Plan in which the future use of the Harbor area was discussed. (Chronology, Tab 70, 3/15/2003 Forum)

- On May 18, 2003, USEPA issued a "special notice letter" to the City. The letter stated that the USEPA would sue the City if it did not agree to abandon its efforts to redevelop the Coke Plant property in accordance with the ULI Panel Recommendations and what was emerging as the concept that would become the Master Plan. (Chronology, Tab 74, 5/18/03 Letter; Tab 75, 5/30/2003 USEPA Fact Sheet). The City responded by filing a Petition to amend the ROD, explaining that the reasonably anticipated future land use of the Coke Plant property, Harbor area and the entire lakefront was no longer industrial. (Chronology, Tab 81, 7/17/2003 Petition)
- As a result of the City's demonstrated resolve to not abandon its plan for the lakefront, and with substantial assistance from Bill Muno at USEPA, the City, polluters and USEPA reached a compromise that allowed for the residential redevelopment of the Coke Plant property. (Chronology, Tab 87, 9/28/2004 ESD; Tab 88, 10/13/2004 Consent Decree)
- On January 5, 2007, USEPA, the polluters and the City reached a further agreement authorizing relocation of the groundwater treatment plant from the Coke Plant property to the "Triax Building" on the OMC North Plant property (Plant 2), by then owned by the City. The groundwater treatment plant, if not relocated, would have delayed residential redevelopment of the Coke Plant property. (Chronology, Tab 96, 1/5/2007 Joint Notice)
- On October 20, 2008 the Soil Management Plan for the Coke Plant property was finalized. This document sets forth the type of engineered barriers and other details required for development of the property as a mixed use residential development. The Soil Management Plan addresses three general categories of environmental controls that must be incorporated into a residential development: institutional controls, engineered barriers and soil management. The purpose of an institutional control, for example, is to assign responsibility for maintaining engineered barriers. Engineered barriers are structures that cover (exclude human contact) with contaminated soil. Soil management controls the manner of excavation and moving of soil around on the property. Approval of the Soil Management Plan was the last step necessary for the City to issue Requests for Qualifications and Proposals for the mixed use development of the property. (Chronology, Tab 130, 10/20/2008 Soil Management Plan)
- On January 14, 2009 the City, Larsen Marine, IEPA and USEPA entered into an agreement authorizing redevelopment of the former Slip 3 in the North Harbor (now a PCB containment cell) as a boat storage facility. The agreement provides Larsen Marine with needed boat storage capacity and makes 10 additional acres of land on the former Coke Plant property (now

known as the "Peninsula") available for residential development. (Chronology, Tab 140, 1/14/09 Joint Notice)

- City staff, working closely with the Harbor City Renaissance Commission, are finalizing an RFQ/RFP for a mixed use residential development on the Coke Plant property. The RFQ/RFP package is expected to be issued in the Spring of 2009.
- ii. OMC North Plant (Plant 2)
- On July 12, 2002, USEPA entered into a settlement agreement with the OMC Bankruptcy Trustee that allowed the OMC estate to "abandon" the North Plant. (Chronology, Tab 42, 7/12/2002 Order) This was despite the City's request that USEPA fight to fund the cleanup of the OMC property with the \$96 million the bankruptcy estate obtained from the sale of the OMC assets. The City immediately began negotiations with the Bankruptcy Trustee, USEPA and IEPA on the terms under which the City could take title to the North Plant without assuming environmental liabilities. It was completely unacceptable to the City that the North Plant would sit unsecured, contaminated, a fire hazard and general public nuisance. On January 19, 2003 the City negotiated an "option" to purchase the North Plant for \$130.00. The option would only be exercised after the City reached an agreement with USEPA and IEPA concerning a release and protection from liability for the contamination on and from the property. (Chronology, Tab 61, 1/9/2003 Option Agreement) On June 23, 2005, after almost two years of negotiations with USEPA and IEPA, the City finally reached an agreement with USEPA and IEPA. The agreement allowed the City to exercise its January 19, 2003 option, but not assume environmental liabilities for the contamination at and from the North Plant. (Chronology, Tab 90, 6/23/05 Consent Decree)
  - On September 30, 2005 the City took title to the North Plant. (Chronology, Tab 92, 9/30/05 Deed) The City now controls approximately 100 acres of lakefront property facing onto both the North Harbor and Lake Michigan. The City is now the largest single land owner within both the Harborfront and North Harbor (as those areas are designated in the Master Plan and Design Guidelines).
  - On June 19, 2006 the City entered into a contract with Lake County Grading to demolish the die caste building located at the east end of the OMC North Plant. On 6/21/2006 the City notified USEPA and IEPA that demolition was to commence. With the demolition of this structure the eastern half of the North Plant, along with the Coke Plant property, is now ready for a mixed use residential development as contemplated by the Master Plan.
  - On February 7, 2007 the City's consultant, Conservation Design Forum, prepared a conceptual design for an EcoPark along the north side of the OMC North Plant as contemplated by the Master Plan. A large area of ecological features and pedestrian trails contemplated by ULI and the

Master Plan, and outlined in concept by Conservation Design Forum, would be taken up by the "berm" USEPA proposes to construct on the north side of the North Plant with the \$35 million dredging alternative that is the subject of these comments. The ecological restoration and public amenities described in the conceptual design would not be disturbed by the \$9.6 million capping alternative. (Chronology, Tab 97, 2/7/2007 Conceptual Design)

- On September 18, 2008 the City submitted comments on the second ROD issued by USEPA for the former OMC North Plant. The second ROD addressed groundwater contamination. The purpose of the City's comments was to ensure that the City and USEPA would be able to work together, during the design phase of the remedial action, to address any potential interference with residential redevelopment of the property, as contemplated by the Master Plan, that may result from pumping associated with the groundwater remedy.

iii. Kinder Morgan Power Plant

- In September 2000, the North Shore Sanitary District ("NSSD") and Carlton, Inc. entered into a Ground Lease. Carlton, Inc., and its partner Kinder Morgan, ultimately proposed an intermediate base load power plant on that located immediately north of the OMC North Plant.
- On October 4, 2001 Tomlin recommended the denial of the conditional use and height variance requested by Kinder Morgan, because the proposed industrial use was not consistent with the commercial, recreational and residential uses on the lakefront contemplated by the 1987 Comprehensive Plan. (Chronology, Tab 21, Staff Recommendation) Although the Master Plan was under development, it would not be adopted by the City Council until July 2003.
- On October 13, 2001 Mayor Drew, in a letter to the citizens of Waukegan published in the Waukegan News-Sun, stated, "So, if not a power plant what will we do? We will harness the energy and commitment that has been demonstrated in the public hearings over the past several months. We will capitalize on the broad and overwhelming cooperation that has been displayed. We will tap into the vast reservoir of talent, creativity and intelligence that has been exhibited. In doing so we will make our lakefront the polished gem that we all know it can be. And that polished gem will create more jobs, generate more revenue, and be the source of more civic pride than any power plant would have allowed for." (Chronology, Tab 22, 10/13/2001 Letter)
- On November 20, 2001, despite \$59 million in host benefits offered to the City, the Kinder Morgan power plant proposal did not gain the votes necessary to be reported out of the Judiciary Committee for a vote by the full City Council. Kinder Morgan subsequently withdrew the proposal. (Chronology, Tab 27, 11/20/2001 News-Sun)

iv. NSSD Sludge Incinerator

No issue has more galvanized community support around the Master Plan than the NSSD's proposal to import sewage from Highland Park and Gurnee for incineration on the lakefront (about 100 yards north of the OMC North Plant). The NSSD took the legal position that it was exempt from all City ordinances, including the City's zoning ordinance. NSSD's attitude that the "lakefront is and will always remain industrial" outraged the residents of the City. Ultimately, the incinerator was stopped dead in its tracks.

- After spending months trying to convince IEPA that a sludge incinerator is a "waste facility" requiring local siting approval from the City Council, on December 6, 2001 the City filed suit in the Circuit Court of Lake County alleging that the NSSD's proposed lakefront sludge incinerator required local siting approval or, in the alternative, zoning approval. In either case, the complaint alleged that the Waukegan City Council must approve the location of the incinerator. (Chronology, Tab 28, 12/16/2001 Complaint)
- After a ruling by Judge Stephen Walter that the NSSD had to apply to the City for zoning approval of the sludge incinerator, on July 30, 2002 Tomlin issued a staff report on the NSSD's proposed sludge incinerator. Tomlin concluded that the proposed incinerator on the lakefront was clearly inconsistent with the "trend away from more intense industrial uses" and the "conscious and deliberate directive on the part of the Waukegan City Council" to pursue post-industrial land development strategy for the lakefront. (Chronology, Tab 46, 7/30/2002 Staff Report)
- On October 17, 2002 the Waukegan Development Commission unanimously recommended denial of NSSD's conditional use and variance applications for the proposed sludge incinerator. On October 21, 2002, the City Council unanimously denied the requests by NSSD for a height variance and conditional use permit for the construction of the proposed lakefront sewage sludge incinerator.
- With the court holiday for Presidents day, and the NSSD's IEPA construction permit about to expire, the NSSD attempted to "commence" construction so as to prevent its IEPA permit from lapsing. The News-Sun reported on the scene in front of the NSSD gate that Monday morning: "The entrance to the North Shore Sanitary District's Pershing Road complex took on the look of Checkpoint Charlie Monday as city officials ordered a small fleet of municipal vehicles to block the expected start of construction on a controversial sludge processor." (Chronology Tab 66, 2/18/2003 News-Sun)
- On March 5, 2003, after having issued a temporary restraining order against NSSD, Judge Walter issued a preliminary injunction barring the NSSD from proceeding with construction of the sludge incinerator and remanded the matter to the Waukegan City Council for further proceedings relating to potential emissions from the proposed incinerator. (Chronology, Tab 69,

3/5/2003 Order) On May 7, 2003 the NSSD announced its decision to abandon its effort to build its proposed sewage sludge incinerator on the Waukegan lakefront and relocate the project to Zion.

- On June 13, 2003 the Illinois Appellate Court affirmed the City's authority to require the NSSD to comply with its zoning ordinance and building code.

v. Yeoman Creek Landfill Disposal Option

- As previously noted, on August 16, 2002, without any request from the City, USEPA designated the City an "Environmental Justice Community". (Chronology, Tab 50, 8/16/2002 USEPA Letter) This led directly to USEPA's effort to provide for disposal of dredged sediments from the Harbor at the Yeoman Creek Landfill Superfund Site (the "YCL option"). The YCL option was an ill-conceived, expensive and dangerous plan to place heavy, wet sediments on top of a wet, unstable landfill. Such was the inauspicious beginning of the debate in Waukegan regarding "what to do about the Harbor".
- On April 16, 2004 the City Council rejected the YCL option. The News-Sun reported that, "Some aldermen say they suspect that the cleanup project is just a way to get the city to swallow a deep dredging project." "What is evident is that this is a dredging project and not a cleanup project," said Ald. Rick Larsen (8th). "We could do some cleanup of the harbor--if that is what their true intent is--without deep dredging." "In addition to concern over the safety of placing the PCB sediments at the landfill (and the added cost to the City of doing so), the City Council expressed concern that the ACOE dredging project would open the harbor to more industrial shipping at a time when the City is attempting to redevelop the harbor as a mix of recreational, commercial and residential uses." (Chronology, Tab 85, 4/16/2004 News-Sun article)

vi. Tar Pit Property

The North Shore Gas Company ("NSG") operated a manufactured gas plant on this property from 1912 to 1953. The property is located immediately north of the OMC North Plant. The property is highly contaminated with tar, a residue from the gas manufacturing process. The property is located within the area designated as the North Lakefront in the Master Plan. (Chronology, Tab 79, 7/1/2003 Master Plan, p. 25) The Master Plan calls for the reestablishment of the wetlands, dune and swale system with the North Lakefront, and specifically on the Tar Pit Property. (*Id.*) This future use is incompatible with a tar pit, or a tar pit cleaned up to meet an industrial standard. This cleanup plan for the Tar Pit Property will be selected by USEPA under the Superfund Program. On February 11, 2003 NSG advised the City that it intended to clean up Tar Pits to an industrial standard. The City responded by reminding NSG of the requirements of the

City's Solid Waste Nuisance Ordinance, which requires that cleanup achieve a residential standard that is compatible with reestablishment of the Moorlands contemplated by the Master Plan. On August 12, 2008, the City, NSG and USEPA had a meeting to discuss cleanup levels for the Tar Pit Property. The City emphasized the importance of cleaning the property to the level necessary to accommodate the Moorland contemplated by the Master Plan. USEPA Attorney Peter Felitti reminded the City that the remedy selected under the Superfund statute must not only be consistent with the "reasonable anticipated future use of the property" as designated in the Master Plan, but must also be "cost effective".

vii. The Great Lakes Legacy Act Proposal

The inability of the former administration and the City to reach an agreement for Great Lakes Legacy Act ("GLLA") funding of a Harbor cleanup plan exposed the central disagreement, or disconnect, between the City and USEPA.<sup>9</sup> All of the foregoing information about the City's commitment to a new vision for its downtown and lakefront, and the battles fought to defend that vision, were irrelevant to USEPA under the former administration. This reflects a wholly myopic view of the Harbor. The only thing that mattered was dredging for the benefit of the remnants of Harbor industry. The relationship the cleanup plan had to the Master Plan; how the redevelopment of the lakefront would place the City and Waukegan School District on a firm financial footing; the opportunity for the City to become a great New Harbor City; the relationship between advancement of the Master Plan and smart growth strategies, urban renewal, ecological restoration and social justice – all these concepts were deemed to be irrelevant. All of these things, according to USEPA, "have nothing to do with restoration". (Chronology, Tab 115, 8/22/2007 Press Release) This narrow view of USEPA's mission and how it ought to relate to a post-industrial city stood as an obstacle to a meaningful dialogue. However, as Mayor Hyde stated in his January 27, 2009 letter, with referral of the Harbor to the Superfund Program, an entirely new set of regulatory and procedural requirements came into play. (Chronology, Tab 148, 1/27/09 Mayor's Letter)

Unlike the GLLA, the Superfund statute mandates that USEPA make a judgment concerning the reasonably anticipated future use of the Harbor. In light of the clarity with which the City Council has spoken with respect to the Master Plan, the documented trend of development away from industry on the lakefront, the City's demonstrated commitment to the Master Plan, and USEPA's

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<sup>9</sup> The chronology of the unsuccessful effort to reach an agreement dependent upon federal legislation "de-federalizing" the Harbor, or otherwise restricting deep draft vessels, is set forth in the Chronology and will not be repeated here.

own prior recognition that the future use of the Harbor was no longer industrial, how could USEPA nevertheless conclude that the reasonably anticipated future use of the Harbor and land it serves will be industrial? How could USEPA justify spending \$25.4 million more on a dredging project to serve an “industrial” Harbor of a bygone era, and which is out of step economically and politically with the community? To ignore these facts, to blindly claim “once an industrial harbor always an industrial harbor”, evidences a bureaucratic predisposition towards the dredging option. By refusing to follow the Land Use Directive and secretly fostering a view that favors Harbor industry, USEPA fails in its responsibility to impartially discharge the duties assigned it by Congress under the Superfund statute.

viii. The City Was Forced To Pursue The PRPs Because USEPA Would Not

It is important to remember that in 1981 the USEPA ignored the prior recommendation of its own consultant and failed to require the complete removal of the PCBs from the Harbor. We are here now, still trying to determine “what to do about the Harbor”, because of that failure. In January 1981, Mason & Hanger-Silas Mason Co., Inc., under contract with USEPA, prepared a report entitled *AN ENGINEERING STUDY FOR THE REMOVAL AND DISPOSITION OF PCB CONTAMINATION IN THE NORTH HARBOR - WAUKEGAN HARBOR AND NORTH DITCH AT WAUKEGAN, ILLINOIS*. The Mason Hanger Study recommended a complete dredge of the Harbor, including “marginally” contaminated sediments in Areas A, B and C of the Harbor. (Chronology, Tab 2, Study. pp. 30 (Figure 7) and 40 (Figure II))

On July 14, 1983 USEPA issued a Source Control Feasibility Study for Waukegan Harbor. USEPA retreated from the recommendation made in the 1981 Mason & Hanger Study. USEPA decided to scale back the dredge to only remove sediments contaminated with PCBs at concentrations of greater than 50 parts per million (“PPM”). (Chronology, Tab 3, 7/14/1983 Study, pp. xiii and Figure 5-2) Whereas Mason & Hanger proposed dredging all the Harbor (except the approach channels), USEPA, as an accommodation to OMC, decided only to dredge that portion of the Harbor north of the OMC South Plant (now owned by Bombardier). (Chronology, Tab 7, 5/24/1996 as-built drawing of limited area where PCBs were removed)

Evidently, economic considerations and OMC’s “ability to pay” factored into USEPA’s analysis. But there is nothing in the administrative record (at least nothing that has been provided to the City) to justify USEPA’s failure to pursue other parties that were liable under §107(a)(1) of CERCLA, 42 U.S.C.A. 9607(a)(1). There was certainly sufficient information available to justify that

pursuit. On November 21, 1989, the Elgin, Joliet & Eastern Railway Company conveyed the northern half of what was then Slip 3, submerged land, to OMC. (Chronology, Tab 5, 11/21/1989 Deed) This conveyance was accomplished as part of the first removal action for the contaminated sediments performed in 1992, which involved constructing and filling a PCB containment cell inside Slip 3. Slip 3 was then a “navigable water”. At least as far back as 1989, therefore, USEPA clearly knew that the North Harbor, and the submerged lands therein, were privately owned.

Despite this prior knowledge, USEPA is apparently still claiming that it does not know who owns the bottom of the North Harbor. In a memorandum issued in September 2008 In connection with the selection of the proposed plan for the Harbor,<sup>10</sup> USEPA’s National Remedy Review Board stated:

Lastly, there is the legal question of "who owns the harbor/navigation channel" that is the targeted subject of the proposed cleanup action. The City of Waukegan has said that it does, but the Region is not certain that is actually the case. Counsel has not completed researching the issue, and it is ultimately possible that the adjacent shoreline owners do own the harbor to the middle of the channel, even though the USACE states that it owns the sediment if it is located in "its" navigation channel.

The answer, if one was really necessary, has been provided by the City and Judge Kennelly, of the United States District Court for the Northern District of Illinois. (Chronology, Tab 123, 5/13/2008 Second Amended Complaint; Tab 133, 11/24/08 Opinion and Order)

Referral of the Harbor to the Superfund Program<sup>11</sup> was not without risk to the private parties who own the submerged lands in the North Harbor. The Superfund statute is not a public works program – USEPA always asks others to pay the bill.<sup>12</sup> The City and Waukegan School District know this from their experience at the Yeoman Creek Landfill. (Chronology, Tab 9, 4/7/1999 Consent Decree) The City and School District are still paying 34.5% and 10.5%, respectively, for the cleanup of the Yeoman Creek Landfill. The School District is paying simply by reason of its status as an “owner” of the land.<sup>13</sup>

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<sup>10</sup> This memorandum is already part of the administrative record and is therefore not attached to the City’s public comment.

<sup>11</sup> Cleanup of the Harbor was referred to the Superfund Program in September 2007. (Chronology, Tab 118, 9/28/2007 Letter)

<sup>12</sup> See exchange of correspondence between the City and USEPA on the issue of USEPA filing a Superfund lien to recoup its costs, and the detrimental effect such a lien could have on the City’s efforts to redevelop the lakefront. (Chronology, Tab 138, 1/2/09 Email to USEPA; Tab 144, 1/20/09 Letter to USEPA)

<sup>13</sup> In March 2006 the School District applied to the court for relief from its obligations under the Consent Decree. The School District argued that “extraordinary circumstances” justified relief and that the School



As another example, on June 20, 2007 the City was forced to sign a Consent Decree to pay for the cleanup of the former “Shooting Range Site” that was contaminated with asbestos. (Chronology, Tab 111, 6/20/07 Consent Decree) In 1958 the U.S. Army built a shooting range on the lakefront to host the shooting competition for the PanAmerican Games in 1959, on property owned by Johns Manville and the City. The “berms” for the shooting range were constructed of asbestos debris from Johns Manville. In September 2007 the City paid USEPA \$1,382,000 (37% of the cleanup cost). The USEPA demanded payment because the City was an “owner” of a portion of the site. In April 2007 the City asked for a payment schedule that would allow the City to pay the \$1.3 million to USEPA in installments, with interest. USEPA rejected this request out of hand and demanded immediate payment. In contrast, the Army, which designed and constructed the shooting range site, was only required to pay its 20% share (\$750,000) “as soon as reasonably practicable” and only if Congress approved the payment.

The submerged lands in the North Harbor and Slip 1, where the PCB contaminated sediments are located, are privately owned by, among others, the remaining Harbor industries. USEPA has required the City and School District to pay millions to clean up Superfund sites simply because of their status as “owner”. USEPA has yet to explain why it is not holding the Harbor industries to the same standard.<sup>14</sup>

As noted above, Region 5 acknowledges that “it is ultimately possible that the adjacent shoreline owners do own the harbor to the middle of the channel”. This is more than a mere possibility. The claims in the City’s complaint against the Harbor industries are straightforward. The submerged areas north of the “Federal Harbor” line are privately owned. They became submerged by reason of “avulsion”. Avulsion refers to a sudden event (such as excavation) which causes dry land to become submerged. Title to the newly submerged land remains with the owner of the dry land. This has long been a settled principal of law in Illinois. Judge Kennelly ruled on November 24, 2008 that if areas north of the “Federal Harbor” line were once dry land, but became submerged by reason of excavation, the owners of the dry land (and their successors in title) own the submerged land. The maps collected in Tab 1 of the Chronology reflect the Waukegan shoreline expansion and Harbor construction from 1839 through 2007. These maps conclusively establish

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District’s obligations under the Consent Decree were diverting funds critically necessary for the education and security of the children. The Court denied the School District’s motion.

<sup>14</sup> Notably, USEPA has had no difficulty issuing Special Notice letters to the City. (Chronology, Tab 74, 5/18/03 Special Notice letter issued by USEPA to City at the Coke Plant site.) USEPA should show the same consideration to the Harbor industries that have been judicially determined to be potentially responsible parties for the Harbor cleanup. (Chronology, Tab 133, 11/24/08 Opinion)

that the Harbor was excavated from what had been dry land, and that private ownership of what then became submerged lands has continued through to the present. This means that at least some of the Harbor industries are owners, and liable for cleanup costs under §107(a)(1) of the Superfund statute, 42 U.S.C. 9607(a)(1) (just as the School District has been held liable as an “owner” at the Yeoman Creek Landfill and the City as an “owner” at the Shooting Range Site). (Chronology, Tab 113, 11/24/08 Opinion; Tab 136, 12/12/2008 Press Release.)

ix. There Is Broad Based Political Support For the City’s Master Plan

In his remarks on February 22, 2002, Mayor Hudnut offered wise political advice to the City: work closely with other units of government, local, state and federal, to build consensus around the Master Plan. The City has done that. There may be disagreements over strategy. Some elected officials may even disagree with the City on which cleanup alternative, dredging or capping, will best advance the goals of the Master Plan. These are honest disagreements among people holding principled positions. None of the elected officials to whom the Mayor and City Council have reached out, however, question the wisdom of the Master Plan nor do any dismiss the importance of realizing the City’s vision for the lakefront. The following are a few examples of the consensus the Mayor and City Council have built with their political partners:

- On March 29, 2002, the Waukegan News Sun reported that, “[Lake County] offers help with city lakefront.’ The County expresses its commitment to work with the City to implement the ULI Panel recommendations.” (Chronology, Tab 37, 3/29/2002 News-Sun)
- On March 12, 2002, State Senator Terry Link submitted a letter in opposition to the NSSD sludge incinerator, joining Congressman Mark Kirk in opposing an industrial use that would conflict with the City’s lakefront redevelopment efforts. (Chronology, Tab 43, 7/12/2002 Letter)
- On May 7, 2004 Mayor Hyde, in a letter to Congressman Kirk, expressed the City’s desire to achieve cleanup of the Harbor in a manner that advances the goals of the Master Plan. The Mayor emphasized that he and the City Council will select the Harbor cleanup plan “that makes the greatest contribution towards implementation of the Waukegan Downtown and Lakefront Master Plan.” ( Chronology Tab 86, 5/7/2004 Letter)
- On June 14, 2007, Congressman Kirk sent a letter to U.S. Senator Richard Durbin endorsing the transition of the Harbor from an industrial to a recreational Harbor. (Chronology, Tab 109, 6/14/2007 Letter)
- On August 8, 2007, the News-Sun reported Congressmen Kirk’s agreement that “we’re going to back whatever the City of Waukegan wants.” (Chronology, Tab 114, 8/8/2007 News-Sun article)

- On June 20, 2008, the News-Sun quoted State Senator Terry Link as stating, "I want the harbor capped and the city wants it capped. We don't want it dredged." (Chronology, Tab 125, 6/20/2008 News-Sun)
  - In a July 11, 2008 letter to the News-Sun, State Senator Link stated that, "[City] Council members are looking out for the future development of the city of Waukegan and the growth it will need to sustain local services. Many major cities throughout Illinois and the United States have moved toward redeveloping industrial sites to residential and retail redevelopments with great success. Waukegan has the potential and the drive to develop and enhance the harbor for this purpose. This development would provide a needed influx of new property tax and sales tax revenues -- well over and above the current revenues paid by industry using the harbor. Redevelopment of the harbor is good for the city of Waukegan and I am glad to be able to work with the City Council in their forward-thinking efforts." (Chronology, Tab 126, 7/11/2008 Letter)
- x. Conclusion with respect to the "reasonably anticipated future use" of the Harbor and Harbor area.

We began our discussion of the reasonably anticipated future use of the Harbor by emphasizing the simplicity of the analysis set forth in the Superfund Land Use Directive. The City's future use determination with respect to the downtown and lakefront (as a cohesive whole) has been "determined and documented". The Superfund Land Use Directive does not encourage USEPA to "pierce", "look behind" or otherwise second guess the land use decisions "determined and documented" by the Mayor and City Council. Beyond that, the future use of the downtown and lakefront, as "determined and documented" in the Master Plan (and related documents):

- Is consistent with land use trends on the lakefront;
- The City has demonstrated a sustained commitment to the Master Plan; and
- The Mayor and City Council have obtained "buy in" from their political partners on the importance, for the both the City and greater region, of realizing the goals of the Master Plan.

## **II. ECONOMIC BENEFIT**

As previously noted, the Mayor and City Council have two major concerns with USEPA's determination that the dredging alternative will confer "important redevelopment benefits" on the City:

- The City, not a Federal agency, should be charting the course for the economic revitalization of the City;

- Not only has USEPA failed to provide any data to support its claim of “important redevelopment benefits”, the data confirms just the opposite.

The City Council did not adopt the Master Plan on a whim, without careful consideration. The Master Plan was adopted after extensive public discussion and debate. The Master Plan was developed by the City with some of the nation’s leading experts on urban renewal, smart growth and brownfield redevelopment strategies. The experts that assisted the City in this effort include:

- Skidmore, Owings & Merrill LLP
- Conservation Design Forum
- Site Design Group, Ltd.
- US Equities
- Land Strategies, Inc.
- Development Concepts, Inc.
- C.H. Johnson Consulting

The Master Plan has also received numerous awards from among the nation’s most prestigious land use planning and urban renewal think tanks. (See, e.g., Chronology, Tab 93, 10/27/205 Awards from Burnham Plan Centennial Committee, Congress for the New Urbanism, and Burnham Chicago Metropolis 2020) It is therefore understandable that the Mayor and City Council are concerned by USEPA’s consideration of the “analysis” by an organization like the Northeast Midwest Institute, that stands in stark contrast to the findings in the Master Plan.

i. USEPA Offers No Data To Support Its Economic Analysis

It is difficult to respond to USEPA’s assertion that the \$35 million dredging alternative, and maintenance of a deep industrial Harbor for the benefit of two dependent industries, will confer “important redevelopment benefits” on the City. The administrative record is devoid of any analysis and consists entirely of unsupported declarations and assumptions. Because the record is silent, we can only assume that USEPA may be relying on “studies” prepared by the Northeast Midwest Institute, conducted with partial funding from USEPA. If this is not the case, simply accept our comment as a criticism of the former administration for not informing the public of the basis of its finding that a deep industrial Harbor will confer “important redevelopment benefits” for the City.

Perhaps, the former administration could have avoided this error had it expressed an

interest in consulting with the Mayor, his staff and the City Council. Nonetheless, as the conclusions of the Northeast Midwest Institute differ so radically from those in the Master Plan, we are required to examine the Institute's work in connection with the Harbor.

First, it is important to clarify where the City and the Institute agree. In the Fall of 2003 much was made in the press about the Institute's conclusion that, based on a "survey" of Waukegan residents, dredging the Harbor would increase property values in Waukegan (or the "area") by hundreds of millions of dollars (the reported increase has varied so widely that we will not even attempt to attribute a value). (Chronology, Tab 80, 7/15/03 Survey Regarding "Waukegan Harbor Area") This confusion was promptly put to an end by an exchange of correspondence between the City and Professor Braden, the author of the report. (Chronology, Tab 83, 9/28/03 Exchange of Correspondence) Professor Braden acknowledged that his study should not be quoted as supporting a finding that the dredging of the Harbor will increase property values in Waukegan or a larger region. Rather, Professor Braden agreed that his study related to the "Waukegan harbor area" (or the entire lakefront). On this the City and Master Plan are in agreement: cleanup and redevelopment of the "Harbor area" (what Professor Braden agreed should be defined as the "lakefront") would confer enormous economic benefits on the City and greater region. This is one of the principal conclusions of the Master Plan. (Chronology, Tab 102, 5/4/2007 MaRous letter, "there is no reliable manner to quantify effect upon property values from remediation of harbor sediments".)

Unfortunately, most if not all of the Institute's other conclusions are equally as unfounded as the conclusions (falsely) attributed to the work of Professor Braden, and border on the ludicrous. For example, on July 29, 2003 Barbara Wells of the Institute published a report, again funded in part by USEPA, entitled "Case Studies: Integrating Sediment Cleanup and brownfield redevelopment". This report claims that "all of the harbor area's economic activity [referring to Waukegan] and municipal services depend in some manner on the harbor." The dredging project, according to the report, will "revive the area's industrial base". (Chronology, Tab 82, 8/29/2003 Report, p. 14) Anyone with the slightest knowledge of events in Waukegan over the last two decades would know that this "report" describes a Harbor and economic conditions that have not existed since the 1960's. One must question whether the report's author is even aware of the Master Plan. The author was obviously operating under the illusion that the lakefront will, once again, achieve its former industrial glory. Compare this conclusion, for example, with that reached in the OMC appraisal previously discussed. (Chronology, Tab 11, 8/6/1999 OMC Appraisal) As

noted previously in this letter, even USEPA disagrees with the notion of a “reborn” industrial Harbor.

ii. The Downtown and Lakefront Master Plan Must Be Viewed As A Cohesive Whole

On August 14, 2008, USEPA held a public meeting on the proposed remedial alternative for groundwater at the OMC North Plant. At that time the City expressed concern that, if not properly implemented, the groundwater remedy could delay redevelopment of the western portion of the property as envisioned by the Master Plan. (Transcript of August 14, 2008 Public Meeting, p. 60)<sup>15</sup> A member of the audience responded to the City’s concern about delaying redevelopment of the North Plant by pointing out there is plenty of land on the south lakefront to develop during the 10, 20 or 30 years development of the North Plant is delayed. (Transcript, p. 72) This comment reflects a failure to understand that the Master Plan is a cohesive whole. Investors make decisions on the south lakefront in reliance on implementation of the Master Plan at the Harborfront and North Harbor. Specifically, a future developer of the Peninsula Site (the Coke Plant property) will be very interested to know how and when the Master Plan will be implemented at the Harborfront and North Harbor.<sup>16</sup> In fact, it is the City’s understanding that USEPA received comments from a developer of the South Lakefront expressing this same concern – the Plan needs to be viewed in its entirety.<sup>17</sup>

iii. The Cost Of The Remedial Alternative Does Matter

As previously noted, Superfund is not a public works program – someone always has to pay. It is certainly important that the \$9.6 million capping alternative achieves the same level of protection of human health and environment as the \$35 million dredging option. The \$25.4 million disparity in cost is relevant to taxpayers. It is very relevant to the PRPs. However, the possibility that a lien may be imposed on property owned by the City and others comprising the “OMC Site” is of great interest to the City financially, as well as having implications for redevelopment of the lakefront. Investors face enough challenges without the USEPA imposing liens on lakefront property. This issue has already been addressed in correspondence between the City and USEPA. (Chronology, Tab 138, 1/2/09 e-mail from City; Tab 144, 1/20/09 Letter from City)

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<sup>15</sup> The Transcript is already part of the administrative record and is incorporated as an attachment to this comment.

<sup>16</sup> Chronology, Tab 101, 5/1/07 Brownfield Developer Letter. Brownfield Restoration Group, LLC expresses concern that the dredging alternative will “entrench existing industrial development ... in this area of the City will indirectly impact the value of the proposed commercial/residential development of this area negatively.” For background on the qualifications and experience Brownfield Restoration Group, LLC in the field of brownfield redevelopment, and the experience and qualifications of the author of the letter, see the web site of BRG at <http://www.brownfieldrestorationgroup.com>.

<sup>17</sup> 2/3/2009 e-mail from Southlake Investments, Inc. to Kevin Adler at USEPA.

iv.      Redevelopment Of The Harborfront And North Harbor Confers A Substantial Economic Benefit On The Community

A more useful exercise for the Northeast-Midwest Institute (if their efforts were in fact anything other than a conclusion looking for a rationale) would have been to calculate the economic benefit to the community of redeveloping the Harborfront and North Harbor in accordance with the Master Plan and Design Guidelines. It would have also been helpful for the Institute to compare that economic benefit to the economic benefit the Harbor industries confer on the community. (Chronology, Tab 89, 3/1/2005 Design Guidelines) We have undertaken a very limited analysis of that issue, focusing only on property taxes for selected parcels within the Harbor Front and the North Harbor. The analysis is enclosed as Table 1. The analysis demonstrates that redevelopment of these parcels, in accordance with the Design Guidelines, would confer a net annual economic benefit on the City of \$3.4 million.<sup>18</sup> This analysis is limited to property taxes. We have not attempted to project sales taxes. More important, this analysis does not account for construction jobs and permanent jobs in this segment of the New Harbor City.

This analysis also does not consider the larger contribution to the economy of the Great Lakes Region that a fully developed recreational harbor would have in comparison to the current industrial Harbor. Others, however, have examined this question in more detail:

- On March 1, 2007, the ACOE issued an extensive report on the contribution of recreational boating to the economy of the Great Lakes Region entitled “John Glenn Great Lakes Basin Program, Great Lakes Recreational Boating”. Notably, the ACOE predicted that in the future the status of Waukegan Harbor would change to a “recreational” harbor. (Chronology, Tab 98 3/1/07 ACOE Report, p. 78)
- On June 12, 2007, the Milwaukee Journal Sentinel reported that, “One city wants harbor that's all play, no work. Great Lakes have long history of cargo shipping, but recreational boating now is a major economic force.” The focus of the article was Waukegan’s embrace of a recreational, residential and retail development on the lakefront. The article, referencing the March 2007 ACOE report, also explains the economic benefit of recreational

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<sup>18</sup>      The reference in Table 1 to Blocks HF8, H15 and NH1 are to those blocks as defined in the Design Guidelines.

boating and harbors to the economy of the Great Lakes. (Chronology, Tab 107, 6/1/07 Article)

- On June 9, 2007, an article at OceanNavigator.com reported that, "Ships not wanted on the Great Lakes?" The article stated that "In May, the Waukegan, Illinois, City Council unanimously voted to ban commercial activity in the city's Lake Michigan harbor and promote recreational boating instead. According to a federal study on the economic value of recreational boating on the Great Lakes, recreational boating brings substantial revenues and municipalities should promote it. According to the report, Great Lakes boaters: Spend \$2.35 billion a year on boating trips. Spend \$1.44 billion a year on boats, equipment and supplies. Create 60,000 jobs with \$1.77 billion in personal income." The article noted that the Great Lakes Boating Federation, with 4.3 million members, applauded the City Council of Waukegan, Illinois, for unanimously voting to convert its lakefront from an antiquated fixture of old industry into a hub of public access and a haven for leisure activities." (Chronology, Tab 108, 6/9/07 Article)
- On August 31, 2007, an article appeared in the Detroit Free Press entitled "Turn tide toward recreational boating." The article criticized Sen. Carl Levin, D-Mich., stating "Levin said nothing about the needs of the 4.3 million registered boaters who bring \$16 billion in economic activity to the Great Lakes region -- nearly four times that generated by commercial navigation. This sector is also hurting for lack of dredging, but these small harbors are off limits for the Corps of Engineers." The article went on to specifically refer to Waukegan Harbor, stating "Earlier this year, the city council of Waukegan, Ill., voted unanimously to convert its lakefront from an antiquated fixture of old industry into a hub of public access and a haven for leisure activities. The vote to ban commercial vessels from the Waukegan harbor is a positive step for the economic vitality and environmental health of the community. The Great Lakes Boating Federation believes the Waukegan decision represents the opening of a floodgate as more cities realize the enormous benefits of converting waterfronts to support recreational boating and other forms of public access. Trends indicate that the rate of loss of the Midwest's



industrial base is increasing. Thus, many coastal economies will need to fill the void left by departing industries. The prospect of economic growth in the service and leisure sectors far exceeds that for expanding the industrial base.” (Chronology, Tab 117, 8/31/2007 Article)

- On December 3, 2007, USA Today reported, “Great Lakes see a future beyond industry.” The article stated that the conflict over the future of Waukegan Harbor “symbolizes the dramatic changes sweeping across the five Great Lakes, a region that is trying to reinvent itself in a way that could have major implications for the nation. Attitudes about the Great Lakes have changed so drastically during the past three decades that manufacturers are finding themselves unwelcome even in cities they once ruled.” (Chronology, Tab 121, 12/3/2007 Article)

v. Conclusion Regarding Economic Benefits

The economic analysis inexorably leads to the following conclusions:

- USEPA has provided no analysis or facts to support its conclusion that the \$35 million dredging alternative will have “important redevelopment benefits” for the City.
- In drawing this conclusion, without data or analysis, USEPA substitutes its judgment for that of the democratically elected representatives of the residents of Waukegan.
- If USEPA relied on the studies it partially paid the Northeast Midwest Institute to undertake, it relied on flawed data and methodology.
- The Master Plan is not an *À la carte* menu. The City, and the developers the City seeks to attract, understand that the Master Plan must be viewed, and implemented, as a cohesive whole. Viewed as such, the dredging plan, far from conferring “important redevelopment benefits” increases the challenge to the City of implementing the Master Plan.
- Costs do matter. Somebody will have to pay the extra \$25.4 million cost of the dredging alternative.
- USEPA failed to undertake the most basic economic analysis, utilizing the

Design Guidelines, of the relative economic benefit to the community of a redeveloped Harbor as compared to the existing industrial Harbor.

- The issue before USEPA goes beyond Waukegan Harbor. The Obama administration, including the Department of Commerce, as well as USEPA and the ACOE, need to make significant policy decisions on the economic future of the Great Lakes. As this country struggles through the greatest economic downturn since the Great Depression, old rust belt communities across the Great Lakes Region, not just Waukegan, are attempting to reinvent themselves. Recreational boating and the associated new urban waterfronts will play a critical role in the economic future of the Great Lakes Region. It is obvious that the former administration took a far too myopic view, and failed to see Waukegan Harbor within this broader regional context. This administration cannot afford to do same.

### **III. COMMUNITY ACCEPTANCE**

The Mayor and City Council are seriously concerned that USEPA, under the cover of its subjective assessment of “community acceptance” of the two alternatives, and who it believes truly speaks for the “residents” of the City of Waukegan, may substitute its judgment of what is best for the City for that of its democratically elected representatives. We tread in treacherous waters when a federal agency tries to substitute its judgment for that of local leaders under the guise of gauging “community acceptance”. It was doubtless with this concern in mind that President Clinton issued, and President Bush affirmed, Executive Order 13132 on Federalism, to “ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies.” (Chronology, Tab 134, 12/02/08 Letter, Attachment 5) In making a subjective judgment concerning “community acceptance” of a remedial alternative, USEPA must remember that the Mayor and the City Council are the democratically elected representatives of the residents of the City of Waukegan, not the CAG or any other self-appointed group.

It is also important for USEPA to understand the inclusive, open and democratic process by which the Master Plan was adopted. Some may not be happy with the outcome, but they cannot say their voice was not heard. The following are only a few examples of the community outreach the preceded adoption of the Master Plan by the City Council:

- During his February 22, 2002 presentation of the ULI Panel's recommendations, Mayor Hudnut recounted in detail the Panel's community outreach efforts. The ULI Panel heard from industry, professionals, clergy, politicians and an extensive array of other stakeholders, not just the Mayor, City Council and staff. (Chronology, Tab 45, 7/22/02 Panel Summary, pp. 3 and 39)
- On December 4, 2002 the Harbor City Renaissance Commission held Public Forum I, "From Brownfields to Greenfields, Green Lawns and Playing Fields: Environmental Issues Affecting the Lakefront Redevelopment." Among the themes explored in this Forum, it was "time to take control of our own destiny." Among the issues discussed were the Kinder-Morgan Power Plant, the NSSD Sludge Incinerator, OMC bankruptcy, and the efforts of USEPA and the PRPs to force the City to accept an industrial cleanup at the Coke Plant property. (Chronology, Tab 59, 12/4/2002 Forum I)
- On January 15, 2003 the Harbor City Renaissance Commission held Public Forum II, "Recreational and Arts Opportunities in Waukegan's downtown and lakefront, at the New Harbor City".
- On February 7, 2003, harbor industries sent correspondence to the City stating that they wanted their voices to be heard in the planning process for the lakefront. (Chronology, Tab 62, 2/7/03 Letter)
- On February 11, 2003 the Harbor City Renaissance Commission held the first of a series of four public visioning sessions to obtain community input into the development of the downtown/lakefront redevelopment plan. The CAG, harbor industries and Coke Plant property polluters all participated in these sessions. (Chronology, Tab 63, 2/11/2003 Forum)
- As previously noted, on March 15, 2003 the Harbor City Renaissance Commission and the Skidmore Owings & Merrill team held a Public Forum and made presentation entitled "Establishing First Principles". For the North Lakefront (which includes the Harbor area), the public expressed a desire for "Housing: condos, single family". The topic of "encouraging industrial development to locate outside the lakefront" was discussed (Slide #5) as was redevelopment of the Harborfront and North Harbor for "residential, retail, recreation, special events and open space."

(Chronology, Tab 70, 3/15/2003 Forum)

- On April 12, 2003 the Renaissance Commission, City Planning Department and Skidmore Owings & Merrill held a Master Plan Workshop on the future of the downtown and lakefront. Among the items discussed during this community discussion was "Relocate existing businesses away from the lakefront" and "Cover or paint silos until they can be removed". (Chronology, Tab 71, 4/12/2003 Forum)
- On April 23, 2003 the Renaissance Commission held Forum IV on "New Harbor City – Impact on Waukegan, County and Region". The featured speakers were James C. LaBelle, formerly Lake County Board Chairman and current Senior Advisor to Chicago Metropolis 2020 and George A. Ranney Jr., President and CEO of Chicago Metropolis 2020.
- On June 23, 2003 Skidmore, Owings & Merrill LLP, Conservation Design Forum, Site Design Group, Ltd., US Equities Land Strategies, Inc., Development Concepts, Inc. and C.H. Johnson Consulting presented the Final Waukegan Lakefront - Downtown Master Plan / Urban Design Plan. The Harborfront was described as a Marina District with Marina-Related Services and Retail, Residential, Hospitality and Education (but no industry). The North Harborfront was described as a Residential, Mixed-Use District with Marina Related Businesses, Neighborhood Commercial and Institutional Uses (but not industrial) (Chronology, Tab 78, 6/23/03 Presentation)

#### **IV. IMPLEMENTABILITY – USEPA HAS FAILED TO PROVIDE A RATIONAL, LEGAL BASIS FOR REJECTING THE CAPPING ALTERNATIVE**

In its most recent communication to the City (reiterating the denial of the City's request for extension of the public comment period), USEPA states that:

The Record contains supporting documentation, reports, analysis, studies and memoranda that set forth the basis for the proposed plan. For example, I draw your attention to the Region's "Response to National Remedy Review Board Recommendations for the Waukegan Harbor Operable Unit of the Outboard Marine Corp. Superfund Site," which is included in the Record. This document contains the Region's scientific, technical, and legal analysis of the recommendations made by EPA's National Remedy Review Board for the proposed cleanup action at the Waukegan Harbor site. We believe that this plan itself and at the public [sic] meeting held on November 13, 2008, provide the public with ample information on which to comment on the proposed plan.

(Chronology, Tab 151, February 3, 2009 letter from Richard Karl to Mayor Hyde, p. 1-2) This statement is patently false, and misrepresents what little “public record” exists to justify USEPA’s predetermined result. More specifically, apart from the countless deficiencies in USEPA’s purported “analysis” discussed above, there is no “legal analysis” in the “public record” regarding the propriety of the capping alternative. Indeed, any “record” that exists regarding this issue is anything but “public”. Rather, USEPA’s failure to consider the factors discussed above appears to result from an unsupported legal assumption that some additional legal authority would be required in order to cap the Harbor, so that the capping alternative cannot even be considered. In turn, as noted, the basis (if any) for this flawed assumption has consciously been kept out of the public record.

Turning first to Response No. 6 in Region 5’s “Response to National Remedy Review Board Recommendations for the Waukegan Harbor Operable Unit of the Outboard Marine Corp. Superfund Site”, a limited hot spot removal is rejected, at least in part, because “a residual sand cover would still be necessary, likely resulting in the need to remove additional material to accommodate a 6-inch sand layer and **maintain current depths for current uses of the harbor.**” [Emphasis added]

Even more telling is the discussion regarding Comment 10:

**Comment 10:** "Based on the information presented to the Board, it was unclear how the federal authorization of the channel is being considered by the Region in selecting a remedy that addresses contaminated sediments and makes the channel available for USACE to maintain at the specified depth. The Board recommends that the Region further evaluate all of the potential legal requirements (including, for example the Clean Water Act) in selecting a remedy for the site. The Board also recommends that the Region clarify the role, if any, of beneficial use impairments."

**Response 10:** The Region agrees that that, strictly speaking, the USACE's navigational interests in a particular harbor and its dredged depth is not an applicable regulation, as under CERCLA 121(d)(2)(A) ARARs are limited to federal environmental regulations (and state environmental or facility siting requirements). We do, however, attempt to harmonize our remediation activity with existing law when relevant or appropriate to do so. For example, the Occupational Safety and Health Act (OSHA) of 1970 is a non-environmental statute we generally require our remedial actions to comply with (and has been called an ARAR in the past). And, we often consider it necessary to have transporters of cleanup site wastes to disposal facilities meet U.S. and/or state Department of Transportation (DOT) or even local government weight-load requirements for roadways.

The Region always considers current and future land use when we select a cleanup remedy (i.e. commercial-industrial, mixed-use, residential, etc.). There are two rationales we have for respecting the USACE designation of

Waukegan Harbor as a navigation channel of 18 feet. The first is more compelling: it was an act of Congress that designated Waukegan Harbor as a federal navigation channel with an authorized depth of 18 feet. Therefore, only an act of Congress should change that designation and depth and not a remedy decision made by an executive agency. The second reason is that the harbor's current and future use is as a commercial-industrial-use harbor. In most locations in Waukegan Harbor, the channel depth is already 18 feet. Capping a portion (or all) of the already existing 18-foot navigation channel would likely change the current and future use of the harbor by reducing the likelihood that supply boats would be able to access the industries.

Lastly, there is the legal question of "who owns the harbor/navigation channel" that is the targeted subject of the proposed cleanup action. The City of Waukegan has said that it does, but the Region is not certain that is actually the case. Counsel has not completed researching the issue, and it is ultimately possible that the adjacent shoreline owners do own the harbor to the middle of the channel, even though the USACE states that it owns the sediment if it is located in "its" navigation channel. Thus, if the Region were to select a capping remedy for the entire harbor, the industries that use the harbor to bring in their raw materials could have a legitimate "takings" claim against the United States.

Ownership of the Harbor bottom has been addressed above – all of the submerged areas north of the “Federal Harbor” line are privately owned. The City has never said that it owns the entire Harbor bottom, and has pointed out exactly the opposite in the Harbor Litigation.<sup>19</sup> The statement that “the harbor's current and future use is as a commercial-industrial-use harbor” has also been addressed above – this is a statement completely devoid of factual support, wholly contradicted by the administrative record.

There is also nothing in the public record to support the concern about a “takings” claim. This dearth of “analysis” is probably explained by the fact that such takings claims in situations like this have had little success in the courts. See, *e.g.*, *John R. Sand and Gravel Co. v. U.S.*, 57 Fed.Cl. 182, 187-189 (2003); *U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 734 (8<sup>th</sup> Cir. 1986).

More to the present point, Region 5 recognizes that USACE's navigation interest does not qualify as an ARAR that must otherwise be taken into account in accordance with §121(d) of CERCLA, 42 U.S.C. 9621(d). Rather, the concession to “navigation interests” (an evident euphemism for favoring the remnant of Harbor industry over the City's development and land use plans) is couched in terms of an “attempt to harmonize our remediation activity with existing law....”

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<sup>19</sup> Although the City does own a portion of the Harbor bottom which extends from the Coke Plant property.

Region 5 then elevates this concern about “harmony” to Congressional proportions, since the current authorized depth of the Harbor results from the Rivers and Harbors Act of 1899, 33 U.S.C. 401, *et seq.*

Notably, this “concern” about competing Federal legislation is also the stated basis (although likewise devoid of legal analysis) for the rejection of the capping alternative in the October 2008 *FEASIBILITY STUDY REPORT OMC WAUKEGAN HARBOR SITE* prepared for USEPA by CH2M Hill. In discussing the capping alternative (Alternative 5), CH2M Hill states:

This alternative will be viable if the harbor is deauthorized as a federal navigational channel and access to commercial ship traffic is restricted.

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The implementation of Alternative 5 is dependant [sic] on the de-federalizing the harbor and restricting access to the deep draft commercial vessels. Without the de-federalizing the harbor, the cap in the navigational channel would be disturbed by the deep draft vessels entering the harbor and would re-expose the contaminated sediment. In addition, the placement of a cap would impede the USACE’s ability to maintain the navigational channel.

(Feasibility Study, pp. 4-11, 5-13) The sole “legal analysis” behind this opinion is set out in Appendix A, Summary of Federal ARARs, to the Feasibility Study. CH2M Hill cites to the Rivers and Harbors Act of 1899 as support for the “requirement”, identified as an ARAR, of “approval from USACE for dredging and filling work performed in a navigable waterway of the U.S. Activities that could impede navigation and commerce are prohibited.”

There are two fundamental defects in this “legal analysis”. First, as noted above, USEPA itself has rejected the notion that USACE’s navigation interest is an ARAR. Even more important, both Region 5 and CH2M Hill ignore the express preemption provision in §121(e)(1) of CERCLA, 42 U.S.C. 9621(e)(1):

No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

The preemption provision has routinely been utilized to defeat claims that onsite remedial activities require Federal, State, or local permits. See, *e.g.*, *McClellan Ecological Seepage Situation v. Cheney*, 763 F.Supp. 431, 424-435 (E.D.Cal. 1989) vacated on other grounds, 47 F.3d 325 (9<sup>th</sup> Cir. 1995) (RCRA permit); *U.S. v. City and County of Denver*, 100 F.3d 1509, 1513 (10<sup>th</sup> Cir. 1996)

(Local zoning); *Monterey Bay Unified Air Pollution Control District v. U.S. Department of the Army*, 176 F.Supp.2d 979, 990-991 (N.D.Cal. 2001) (Local permit)<sup>20</sup>

The question that thus begs to be answered is, what “legal analysis” has USEPA conducted, as claimed in the February 3, 2009 letter to Mayor Hyde, with respect to the clear preemption provision in the statute that USEPA is mandated to adhere to and enforce? The issue was definitely “discussed” internally. During a public meeting on November 13, 2008, Kevin Adler, the Region 5 project manager, admitted that lawyers within USEPA had “conflicting opinions” on the issue of whether the President is authorized under CERCLA to place a remedial cap within a navigable channel. (Chronology, Tab 131, Public Meeting Transcript, p. 18) But what was the nature of those opinions, conflicting or otherwise? The City sought to find out, by submitting a FOIA request for the “legal analysis” that Mr. Karl claims was conducted. (Chronology, Tab 132) What was the response? On January 28, 2009, USEPA stated that the subject of the “conflicting opinions” had been designated “confidential” and would not be disclosed to the City. (Chronology, Tab 150)<sup>21</sup>

The critical importance of this purported “legal analysis”, and USEPA’s outright refusal to disclose it, leads to one inexorable conclusion – disclosure would be inconvenient in the context of USEPA’s preferred remedy and its bias in favor of the Harbor industries. If USEPA had to admit the truth – that the issue of the “navigational interest” is a mere strawman – then USEPA would actually have to explain why it has misrepresented, or completely ignored, all of the parameters for selection of a preferred remedy.

USEPA is not above the law. It may not “mislead any of the parties, discriminate unfairly, or engage in deceptive practices....” *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 93 (1st Cir.1990). USEPA’s conduct in this case, in slavishly adhering to pre-determinations made during the prior administration, is also completely contrary to the directive issued by Administrator Lisa P. Jackson:

1. When scientific judgments are suppressed, misrepresented or distorted by political agendas, Americans can lose faith in their government to provide strong public health and environmental protection.

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<sup>20</sup> There are certain non-environmental requirements that must be adhered to even in the face of the preemption provision. A primary example of this is compliance with wage rates and labor standards mandated by §104(g) of CERCLA, 42 U.S.C. 9604(g). The point here is that Congress is certainly able to specify when compliance with other requirements is mandated. No such requirement exists for permits under §404 of the Rivers and Harbors Act.

<sup>21</sup> In a separate response, the National Oceanic and Atmospheric Administration also stated that an internal review of the President’s authority under CERCLA to place a remedial cap within a navigable channel is “confidential” and exempt from public disclosure. (Chronology, Tab 142)



2. [P]olicy decisions should not be disguised as scientific findings. I pledge that I will not compromise the integrity of EPA's experts in order to advance a preference for a particular regulatory outcome.
3. EPA needs to exercise policy discretion in good faith and in keeping with the directives of Congress and the courts. When Congress has been explicit, EPA cannot misinterpret or ignore the language Congress has used. When a court has determined EPA's responsibilities under our governing statutes, EPA cannot turn a blind eye to the court's decision or procrastinate in complying.
4. EPA's actions must be transparent. \*\*\* Public trust in the Agency demands that we reach out to all stakeholders fairly and impartially, that we consider the views and data presented carefully and objectively, and that we fully disclose the information that forms the bases for our decisions. I pledge that we will carry out the work of the Agency in public view so that the door is open to all interested parties and that there is no doubt why we are acting and how we arrived at our decisions.
5. We must take special pains to connect with those who have been historically underrepresented in EPA decision making, including the disenfranchised in our cities and rural areas, communities of color, native Americans, people disproportionately impacted by pollution, and small businesses, cities and towns working to meet their environmental responsibilities. Like all Americans, they deserve an EPA with an open mind, a big heart and a willingness to listen.

The City has for some time sought a dialogue with USEPA on the issues raised by this letter. That desire is no less fervent in the aftermath of this submittal. There is still time for reasonable people to arrive at reasonable solutions. The City's representatives remain willing to engage in this effort at your convenience.

Very truly yours,



Jeffery D. Jeep



Michael S. Blazer

Special Environmental Counsel  
City of Waukegan

cc: Mayor Richard Hyde  
Waukegan City Council  
Ray Vukovich, Director of Government Services  
Brian Grach, Corporation Counsel  
Senator Richard Durbin  
Senator Roland Burris  
Congresswoman Melissa L. Bean, Eight District of Illinois  
Congressman Mark Steven Kirk, Tenth District of Illinois  
State Senator Terry Link  
Rahm Emanuel, Chief of Staff  
Lisa P. Jackson, Administrator  
Bharat Mathur, Acting Regional Administrator  
Richard Karl, Director, Superfund Division

# USEPA SELECTION OF THE (SECOND) RESPONSE ACTION FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR

## CHRONOLOGY AND CONTEXT

Tab No.	Date	Description
1A-J	1839-2007	Maps reflecting history of Waukegan shoreline and Harbor development
2	1/1/1981	Mason & Hanger-Silas Mason Co., Inc., under contract with USEPA, prepares <i>AN ENGINEERING STUDY FOR THE REMOVAL AND DISPOSITION OF PCB CONTAMINATION IN THE NORTH HARBOR - WAUKEGAN HARBOR AND NORTH DITCH AT WAUKEGAN, ILLINOIS</i> . The Study recommends a complete dredge of the Harbor, including "marginally" contaminated sediments in Areas A, B and C of the Harbor. See Study, pp. 30 (Figure 7) and 40 (Figure II).
3	7/14/1983	USEPA issues a <i>Source Control Feasibility Study</i> for Waukegan Harbor. USEPA retreats from the recommendation made in the 1981 Mason & Hanger Study to perform a complete dredge of the Harbor to remove even "marginally" contaminated PCBs. USEPA instead decides to scale back the dredge to only remove sediments contaminated with PCBs at concentrations of greater than 50 parts per million (PPM). (Feasibility Study, pp. xiii and Figure 5-2.) Whereas Mason & Hanger proposed dredging all the Harbor (except the approach channels), USEPA, as an accommodation to Outboard Marine Corporation ("OMC"), decided only to dredge that portion of the Harbor north of the OMC South Plant (currently owned by Bombardier). We are still trying to determine "what to do about the Harbor" because of USEPA's ill-conceived decision to reject the recommendation in the Mason & Hanger Report. Evidently, economic decisions and OMC's "ability to pay" factored into USEPA's analysis. There is no indication in the administrative record that USEPA considered the fact that the submerged lands in the North Harbor were privately owned — <i>i.e.</i> , that other entities were liable under Section 107(a)(1) of CERCLA, 42 U.S.C.A. 9607(a)(1) (enacted in 1980). It was left to the City to ultimately pursue these Potentially Responsible Parties ("PRPs") to pay for the cleanup of the PCBs that USEPA and OMC agreed to leave behind. See the 5/13/2008 entry in this chronology (below).
4	12/1/1987	The process of planning for the de-industrialization of the lakefront began well before the arrival of the Urban Land Institute in July 2001 (see this chronology below). The 1987 Master Plan adopted by the City Council first established as a goal "redevelopment of the lakefront for residential, recreational and commercial uses". The 1997 Plan also states: (1) "The lakefront industrial areas provide an opportunity for significantly affecting the character of the City as a whole as it changes to more recreational and residential uses"; (2) "Related recommendations are made for expanding the lakefront plan to include more residential apartment development adjacent to the harbor expansion along with mixed use commercial development for residents and visitors to the area;" (3) "The Plan provides for...Harbor Homes in the proposed Lakefront development; and (4) new industrial uses must be established near the

# USEPA SELECTION OF THE (SECOND) RESPONSE ACTION FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR

## CHRONOLOGY AND CONTEXT

Tab No.	Date	Description
		Airport, on the western edge of the City, to provide "Waukegan with an expanded industrial tax base to take place of the older, heavier industries which are located on the lakefront."
5	11/21/1989	Elgin, Joliet & Eastern Railway Company conveys the northern half of what was then Slip 3, submerged land, to OMC. The first removal action for the contaminated sediments performed in 1992 included constructing and filling a PCB containment cell inside Slip 3. Slip 3 was then a "navigable water" of the United States. There is no indication in the administrative record that USEPA or OMC ever believed that the submerged lands in Slip 3 were owned by the State of Illinois. Rather, it was assumed that the North Harbor, and the submerged lands therein, were privately owned.
6	5/1/1995	USEPA issues <i>Guidance Reuse Assessments: A Tool To Implement The Superfund Land Use Directive</i> . This guidance document requires USEPA to consult with "local land use planning authorities" and "appropriate officials" when making determinations concerning the "reasonably anticipated future use" of a Superfund site. The selected remedy must be consistent with this future use determination. This guidance is affirmed in a subsequent USEPA Directive dated June 4, 2002.
	1/1/1996	The City Council retains CityVision, a consulting firm, to facilitate planning for the redevelopment of the lakefront and downtown.
7	5/24/1996	OMC's consultant submits record of construction (or dredging) confirming that PCB removal was limited to the North Harbor. See Sheet D-3.
	7/1/1997	The City Council amends the City Zoning Ordinance to establish 60 feet as the maximum permitted building height. This amendment applies to new industrial uses proposed for the lakefront.
8	11/6/1998	RI/FS issued for OMC Operable Unit #2, Waukegan Coke Plant Site, Future Land Use Considerations, Appendix 3-A.
9	4/7/1999	City of Waukegan and Waukegan School District enter into Consent Decree with USEPA to perform a \$26 million cleanup at the Yeoman Creek Landfill. The School District was forced to sign the Consent Decree because it owned a portion of the landfill site. OMC also signed the Consent Decree. OMC filed a Voluntary Petition for bankruptcy on 12/22/2000. The bankruptcy of OMC increased the shares of the City and School District for the cleanup costs at the landfill. The City's share increased from 26% to 34.5%. The School District's share increased from 8% to 10.5%. In March 2006 the School District applied to the court for relief from its obligations under the Consent Decree. The School

# USEPA SELECTION OF THE (SECOND) RESPONSE ACTION FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR

## CHRONOLOGY AND CONTEXT

Tab No.	Date	Description
		District argued that “extraordinary circumstances” justified relief and that the School District’s obligations under the Consent Decree were diverting funds critically necessary for the education and security of the children. The court denied the School District’s motion. The School District and City continue to pay for the cleanup of the landfill.
10	4/23/1999	OMC, at the time the owner of the Coke Plant property, submits comments to the USEPA on the proposed Record of Decision ("ROD" or "cleanup plan") for the Coke Plant site (Operable Unit 2 of the OMC Superfund Site). OMC argues to the USEPA that "long term land use issues" have not been adequately considered and addressed. (Comments, p. 2) "The City of Waukegan recognizes that the ability to reuse and redevelop this site is significant and will have fundamental and long-term implications for the future land use and revitalization effort for all Waukegan." (Comments, p. 2) According to OMC, “Redevelopment of this property is not only important to OMC, but it is also an integral part of the overall Waukegan Downtown Revitalization Program.” (Comments, p. 3) The following comment by OMC foretells comments to be made later by the Urban Land Institute: “The FS and Proposed Plan assume that the future site use will be exclusively industrial/commercial and provides no analysis of the cost or implications associated with high-density residential development. Many lakefront redevelopment projects include a high-density residential component. Therefore, we feel strongly that such an analysis is warranted and needs to be included in the FS and Proposed Plan. As part of the additional analysis, the FS and Proposed Plan need to evaluate any technical issues that would be posed by a future residential use scenario or how the solution for the marginal zone soils is either effective or ineffective for a residential scenario. We should note that OMC has recently announced its intentions to close the manufacturing facility in Waukegan, which significantly increases the potential for a residential component to be included in the redevelopment plan, particularly as part of a planned development unit.” (Comments, p. 3) Ultimately, as OMC predicted, the risk assessment was revised to consider the residential redevelopment of the Coke Plant property. (Comments, p. 16)
11	8/6/1999	OMC appraisal concludes that residential and recreational uses are feasible uses of the OMC lakefront properties. The appraisal explained that almost all of the industry on the lakefront moved away from the lakefront and will not return: “The marketability is further constrained by the subject’s <u>marginal industrial location</u> and its impaired functional utility. The bottom line is that most modern industrial users prefer versatile ‘big box’ type facilities in newer industrial parks with <u>nearby expressway access</u> . Given the <u>limited market appeal of the subject property</u> , we feel that, if the property were offered for sale, it could face a protracted marketing period, possibly extending several years.”

# USEPA SELECTION OF THE (SECOND) RESPONSE ACTION FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR

## CHRONOLOGY AND CONTEXT

Tab No.	Date	Description
		(Appraisal, p. 60) (Emphasis added) Noting the challenge confronting all properties on the Waukegan lakefront, the appraisal concludes, "We think it is unlikely that an industrial user from elsewhere would want to relocate to the subject facility, given its <u>marginal location and its functional deficiencies.</u> " (Appraisal, p. 61) (Emphasis Added) Again, foretelling the conclusions of the ULI Panel, the appraiser concludes as follows with respect to the "highest and best use" of the OMC properties: "Thus, while continued use as an industrial facility may serve as a viable interim use of the property, we believe that the ultimate highest and best use would involve a government agency demolishing the existing improvements and to redevelop the site with an ' <u>open space</u> ' recreational use." (Appraisal, p. 64) (Emphasis Added)
12	9/27/1999	Waukegan's Mayor Durkin writes to the USEPA, Region V Administrator, Francis Lyons, offering critical comments regarding the proposed cleanup plan (or ROD) proposed by USEPA for the Coke Plant property. The Mayor expresses particular concern that the contaminated soil to be "consolidated", which will remain on the property, will restrict future development of the property. The Mayor implores USEPA to "not leave the City with a 36-acre, fenced-in, arsenic-concrete monument on the lakefront. . . ."
13	9/30/1999	USEPA issues a ROD for the Coke Plant property which requires a cleanup of soils contaminated with arsenic and other compounds to an "industrial/commercial" standard. This is based on the Feasibility Study submitted by General Motors and North Shore Gas, issued in accordance with the 1995 Land Use Directive (referenced above). The ROD states explicitly that the industrial/commercial cleanup levels for contaminated soils are based on the assumption that the "Future land use at the Site is likely to be commercial or industrial." The ROD foresees the imposition of "institutional controls" (zoning and deed restrictions) to limit the future use of the property. The ROD also acknowledges that "additional work may be required to change from industrial/commercial land use."
	3/2000	Planned demolition of the Johns Manville asbestos plant is announced. Demolition of this large industrial facility on the lakefront has since been completed.
	7/7/2000	Waukegan City Council adopts a 6-month moratorium on the development of electrical generating power plants on the lakefront.
	9/20/2000	North Shore Sanitary District ("NSSD") and Carlton, Inc. enter into Ground Lease. Carlton, Inc., and its partner, ultimately proposed an intermediate base load power plant on the property located immediately

# USEPA SELECTION OF THE (SECOND) RESPONSE ACTION FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR

## CHRONOLOGY AND CONTEXT

Tab No.	Date	Description
		north of the OMC North Plant, also known as Plant 2.
14	12/20/2000	Waukegan Port District unanimously adopts Resolution which notes the decline of industry on the lakefront and recommends a joint study with the City of Waukegan into the feasibility of residential development on the lakefront.
	12/22/2000	OMC files a Voluntary Petition for bankruptcy – a seminal date. Beginning of serious progress regarding lakefront clean-up and redevelopment.
15	1/6/2001	Waukegan News Sun article: "Waukegan busy shaping lakefront renewal" (following OMC bankruptcy).
	1/10/2001	Bankruptcy court enters an Order providing for the expedited sale of all OMC assets by February 5, 2001.
	1/19/2001	Waukegan files an Objection to Bankruptcy Court's 1/10/01 Order, arguing, among other things, that a "fire sale" approach to the sale of the Waukegan lakefront property will result in the abandonment of the most contaminated property.
	1/30/2001	Larsen Marine makes an offer to the OMC Bankruptcy Estate to acquire the Coke Plant property for \$104,000 and seeks Superfund immunity from USEPA.
	2/5/2001	Bombardier enters into an agreement to purchase the assets of the OMC engine division. Bombardier acquires the South Plant property but declines to take title to the Coke Plant and North Plant properties. Bombardier obtains option to purchase the North Plant for \$10.00 (which Bombardier subsequently allows to expire).
16	2/28/2001	Waukegan submits comments regarding the Larsen Marine offer, objecting to conferring Superfund immunity upon Larsen Marine so as to facilitate property transfer. The City explains that parties seeking Superfund immunity must demonstrate a substantial public benefit. City proposes to work with USEPA towards an orderly disposition of the OMC lakefront property and redevelopment of the lakefront.
17	4/11/2001	The City issues a Notice of Intent to Sue OMC and the Bankruptcy Estate under RCRA and TSCA.
	4/19/2001	Executives from Bombardier announce their decision to move OMC's lakefront manufacturing operations to Wisconsin.

# USEPA SELECTION OF THE (SECOND) RESPONSE ACTION FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR

## CHRONOLOGY AND CONTEXT

Tab No.	Date	Description
	6/27/2001	Kinder Morgan, a Texas based power company, files an application with Waukegan for a conditional use permit and variance to construct a 560 megawatt power plant with a proposed height of 130 feet at the lakefront.
	7/1/2001	Waukegan City Council formally invites Urban Land Institute ("ULI") Advisory Panel to Waukegan.
18	8/9/2001	Russ Tomlin ("Tomlin"), Director of the City's Department of Planning and Zoning, issues the Staff Report on the Kinder Morgan proposal for a power plant on land immediately north of the OMC North Plant (on what is known as the "tar pit" property). Staff notes "bold new direction" the City has taken with the lakefront and states the question for the City's Development Commission is whether the power plant can "coexist with the new directions anticipated for the lakefront."
19	8/18/2001	Waukegan News Sun reports the Kinder Morgan proposal to build an intermediate-use power plant with bi-line, "New directions for city's lakefront - Power plant proposal: Waukegan moving away from its industrial past".
20	10/2/2001	The Waukegan City Council rejects a \$40 million financial package offered by Kinder Morgan as an incentive for approving the construction of the lakefront power plant.
21	10/4/2001	Tomlin recommends denial of the conditional use permit and height variance requested by Kinder Morgan, because the proposed industrial use is not consistent with the commercial, recreational and residential uses on the lakefront contemplated by the 1987 Comprehensive Plan.
22	10/13/2001	Mayor Drew, in a letter to the citizens of Waukegan published in the Waukegan News Sun, states, "So, if not a power plant what will we do? We will harness the energy and commitment that has been demonstrated in the public hearings over the past several months. We will capitalize on the broad and overwhelming cooperation that has been displayed. We will tap into the vast reservoir of talent, creativity and intelligence that has been exhibited. In doing so we will make our lakefront the polished gem that we all know it can be. And that polished gem will create more jobs, generate more revenue, and be the source of more civic pride than any power plant would have allowed for."
23	11/1/2001	OMC Bankruptcy Estate files a motion with the Bankruptcy Court for approval to abandon the North Plant. The motion explains that OMC has not been able to attract buyers interested in the industrial property and states the property is of "inconsequential value".



# USEPA SELECTION OF THE (SECOND) RESPONSE ACTION FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR

## CHRONOLOGY AND CONTEXT

Tab No.	Date	Description
24	11/12/2001	Waukegan City Council adopts an ordinance authorizing the City's attorneys to take OMC Coke Plant and North Plant properties by eminent domain.
25	11/19/2001	Waukegan City Council adopts a one-year moratorium on the issuance of all permits for new development on the lakefront.
26	11/19/2001	Waukegan files a formal objection to the sale of the Coke Plant property to Larsen Marine, stating, among other reasons, that the restriction of future use to "industrial" purposes is incompatible with the City's Comprehensive Plan for the redevelopment of the lakefront.
27	11/20/2001	Despite \$59 million in host benefits offered to the City, the Kinder Morgan power plant proposal does not gain the votes necessary to be reported out of Judiciary Committee for a vote by the full City Council. Kinder Morgan subsequently withdraws the proposal.
28	12/6/2001	Waukegan files suit in the Circuit Court of Lake County alleging that the NSSD's proposed lakefront sludge incinerator requires local siting approval or, in the alternative, zoning approval. In either case, the complaint alleges that the Waukegan City Council must approve the location of the incinerator.
	2/6/2002	Following the sudden death of Mayor Drew, Alderman Richard Hyde is appointed acting Mayor by the Waukegan City Council.
29	2/13/2002	Waukegan News Sun reports "As the city picks up the pieces and moves on in the aftermath of Dan Drew's death, the first order of business for many is the upcoming visit by the organization charged with crafting a master plan for lakefront revitalization."
30	2/14/2002	Despite the suggestion by William Muno of USEPA that the City explore the possibility of a future recreational use on the Coke Plant property with General Motors and North Shore Gas, the PRPs remain unwilling to discuss any enhancements to the ROD, even to accommodate a recreational (as opposed to residential) use.
31	2/15/2002	Because the City and the PRPs are unable to reach an agreement on the future use of the Coke Plant property, the OMC Bankruptcy Trustee files an amended motion to abandon all the Coke Plant property, in addition to the OMC North Plant (Plant 2).
	2/22/2002	Former Indianapolis Mayor Bill Hudnut, a Senior Fellow of the Urban Land Institute, delivers the ULI Panel recommendations on the lakefront. The Harbor area is identified as the center of the New Harbor Zone, a

# USEPA SELECTION OF THE (SECOND) RESPONSE ACTION FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR

## CHRONOLOGY AND CONTEXT

Tab No.	Date	Description
		mix of residential, commercial and recreational uses.
32	2/23/2002	Chicago Tribune reports "Waukegan told [by ULI Panel] to ban factories at shore."
33	3/5/2002	In light of the proposed sale of the Coke Plant property, which would restrict the future use of the property to industrial purposes and frustrate the City's lakefront redevelopment plans, the City files a motion with the Bankruptcy Court seeking leave to file an action in the Circuit Court of Lake County to take the Coke Plant property under the City's eminent domain authority. The Court granted the motion.
	3/11/2002	Illinois EPA issues the permits authorizing the construction of the NSSD's lakefront sewage sludge incinerator.
34	3/12/2002	ULI (Mayor Hudnut) presents the Executive Summary of the ULI Advisory Services Panel findings and recommendations at a public meeting. The Panel recommends the "de-industrialization" of the lakefront and states, "With leadership, diligent effort, and partnerships among the public, private, and non-profit sectors, the panel urged the City to pursue 'the polished gem' on the lakefront envisioned by the late Mayor Drew."
	3/12/2002	NSSD submits a building permit application for its proposed lakefront sludge incinerator.
35	3/21/2002	OMC Bankruptcy Estate files a motion seeking Court approval of (1) a settlement with General Motors and North Shore Gas (who caused the pollution at the Coke Plant property) restricting the future use of the property to "industrial" purposes, and (2) for the sale of the property to the City of Waukegan for \$5000.00. Approval of this sale would have been a significant setback for the City's efforts to redevelop the lakefront and implement the recommendations of the ULI Panel.
36	3/21/2002	Following the recommendation by the ULI Panel, the Waukegan City Council enacts a 1% increase in sales tax to fund downtown/lakefront redevelopment.
37	3/29/02	Waukegan News Sun reports, "County offers help with city lakefront." The County expresses its commitment to work with the City to implement the ULI Panel recommendations.
	4/4/2002	Tomlin advises NSSD that the proposed sludge incinerator will require a conditional use permit and variance.

# USEPA SELECTION OF THE (SECOND) RESPONSE ACTION FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR

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Tab No.	Date	Description
38	4/11/2002	Waukegan files an objection to the OMC Bankruptcy Estate's proposed Settlement Agreement with General Motors and North Shore Gas, which would have imposed a deed restriction limiting the future use of the property to "industrial/commercial" uses. The City states that it could not take title to the property with the deed restriction and asked the Bankruptcy Court to "consider the implications of its decisions on the City's efforts to redevelop and reclaim its lakefront."
	4/12/2002	NSSD submits conditional use and variance applications for its proposed lakefront sludge incinerator.
	4/15/2002	City and OMC Estate reach agreement on sale of the Coke Plant property to the City, without any restrictions on future use ( <i>i.e.</i> , the City would not be prohibited from redeveloping the property for residential use as recommended by the ULI Panel). General Motors and North Shore Gas object to the proposed sale of the Coke Plant property to the City without a deed restriction. The parties responsible for polluting the property argue to the Bankruptcy Court that, if the future use of the property is not limited to "industrial", it will cost them too much to clean the property. Judge Barliant rejects these arguments and approves the sale to Waukegan for \$100,000, without any restriction on the future use of the property. OMC Bankruptcy Trustee withdraws the portion of its his seeking approval of a settlement with General Motors and North Shore Gas.
39	5/10/2002	City and OMC Bankruptcy Estate sign contract for sale of Coke Plant property.
40	6/10/2002	Judge Barliant rejects the renewed objections of General Motors and North Shore Gas to the sale of the Coke Plant property to the City. Judge refuses to reconsider his previous ruling of April 23, 2002. General Motors and North Shore Gas argued that they were entitled to protection (in the form of a deed restriction) by virtue of their status as polluters of the property. They sought court intervention in obtaining the deed restriction from Waukegan that they had not been able to obtain from OMC. Judge Barliant ruled that the City, not the polluters, shall decide the future use of the Coke Plant property.
41	6/24/2002	Waukegan takes title to the Coke Plant property from the OMC Bankruptcy Estate. Per the approval of the Bankruptcy Court, the deed does not impose any restrictions on the future use of the property.
42	7/12/2002	Settlement between OMC Bankruptcy Estate and USEPA calling for a limited clean up of the North Plant property by OMC. The settlement requires a cash contribution and a limited cleanup of the North Plant in exchange for the government withdrawing its objection to the

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		abandonment of the North Plant. The effect of the court's July 24, 2002 order is that the North Plant was to be abandoned by the OMC Bankruptcy Estate. The City immediately begins negotiations with USEPA and Illinois EPA of terms under which the City may take title to the North Plant, without assuming environmental liabilities. It was completely unacceptable to the City that the North Plant would sit unsecured and contaminated, as a fire hazard and general public nuisance.
43	7/12/2002	State Senator Terry Link submits a letter in opposition to the NSSD sludge incinerator, joining Congressman Mark Kirk in opposing an industrial use that would conflict with the City's lakefront redevelopment efforts.
44	7/15/2002	The City files an application with the City Council to rezone the Coke Plant property from an industrial to a residential zoning classification. The application states as the "Reason for the Request": "Following recommendations of the 1987 City of Waukegan Comprehensive Land Use Plan calling for expanded residential use on the Lakefront. It is also in line with the recommendation of Urban Land Institute." (Page 4 of 5 of the Application)
45	7/22/2002	In follow-up to the oral presentation of the ULI Panel findings delivered by Mayor Hudnut on February 22, 2002, ULI issues the <i>Final ULI Report - ULI Advisory Services Panel — Waukegan Panel Report</i> . The Report concludes: "The best direction that marvelous lakefront can take is to shed its old industrial uses and take steps to support up to date and in-demand residential, recreational, and non-polluting commercial uses. In short, the lakefront should become a harbor city. That transformation is the parcel's vision. With leadership, diligent effort, and partnership between public and private sectors, the lakefront district can become the 'polished gem' Mayor Drew predicted." (p. 35) The Report states that, "Heavy industry is no longer the highest and best use for Waukegan's lakefront and should be phased out." (p. 10). The Report specifically concludes that land around the Harbor should be residential (p. 27). The Report also recommends that the City produce a detailed master plan for the downtown and lakefront (p. 30). The ULI Panel heard not just from the Mayor, City Council and staff, but an extensive array of stakeholders (pp. 3 and 35).
46	7/30/2002	Tomlin issues a staff report on the NSSD's proposed sludge incinerator. Tomlin concludes that the proposed incinerator on the lakefront is clearly inconsistent with the "trend away from more intense industrial uses" and the "conscious and deliberate directive on the part of the Waukegan City Council" to pursue a post-industrial land development strategy for the

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		lakefront.
47	8/1/2002	City issues Requests for Proposals for a master planner for the downtown and lakefront in follow-up on the recommendation of the ULI Panel.
48	8/2/2002	Joseph Ryan from LaSalle Appraisal Group had previously appeared on before the Waukegan Development Commission on behalf of the NSSD in support of NSSD's proposed lakefront sewage sludge incinerator. Ryan had opined that the industrial uses on the lakefront were "there to stay." Ryan further claimed that the lakefront was still a viable industrial area because redevelopment had not yet occurred. Michael MaRous, a renowned land use and appraisal expert, prepared a report in response to Ryan's comments. MaRous stated that Ryan's opinion "is not supported by the objective facts of the recent trends for the area". As examples, MaRous pointed to the City's acquisition and rezoning of the Coke Plant property and the findings of the ULI Panel.
49	8/8/2002	USEPA advises the City that the cleanup levels previously selected for the Coke Plant property are not consistent with a residential use.
50	8/16/2002	USEPA submits an application to designate the Waukegan an "Environmental Justice Community". The designation, according to USEPA, is necessary "to assist in coordinating the clean-up, restoration, and beneficial end use developments at three large Superfund sites, all located within the City of Waukegan, Illinois," including the Coke Plant property. The proposal acknowledges "The City of Waukegan is planning a major redevelopment of the [Coke Plant] site property" but erroneously suggests "plans include a sports arena". The proposal states "that a formal designation [of Waukegan as an Environmental Justice Community] will enhance their ability to cooperate in developing the properties for the best end uses without significant additional government resources".
51	8/22/2002	Citizens Advisory Group ("CAG") sends letter to Mayor Hyde expressing concern that cleanup of Plant 2 is necessary to prevent "further contamination" of the Harbor.
52	9/13/2002	Tomlin submits Staff Report to the Waukegan Development Commission in support of re-zoning the Coke Plant property from industrial to residential. Tomlin explains that the future use of the Coke Plant property should be dictated by sound land use principles, not the financial considerations of the parties who caused the pollution. Noting the "clear trend towards the de-industrialization of the lakefront", Tomlin stated to the Commission: "The attorneys for General Motors and North Shore Gas, the companies that polluted the Coke Plant property, object to the

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		rezoning of the property. Staff finds that the arguments raised by the polluters are not relevant to the standards set forth in Section 3.10 of the [Zoning] Ordinance. Persons causing pollution do not have a basis to object to the rezoning of the property they pollute. The zoning of the property in the City of Waukegan should be governed by the Zoning Ordinance and the 1987 Plan, not the financial considerations of the polluters of the property. Staff is unable to find any support in the Zoning Ordinance or 1987 Plan for the radical proposition that polluters have a right to dictate the future use of property they pollute – particularly, where the restrictions the polluters seek to impose frustrate the goals and objectives of the Zoning Ordinance and the 1987 Plan." Tomlin goes on to explain that even before the bankruptcy of OMC the trend of development on the lakefront was disinvestment in industrial uses on the lakefront. Apart from the application to locate the Kinder Morgan power plant and NSSD sludge incinerator on the lakefront (both of which were rejected by the City Council), the City had not received a single application to expand or locate an industrial facility on the lakefront in the preceding five years. Tomlin concluded that, "We see a clear trend towards the de-industrialization of the lakefront. The question is not whether heavy industry will return to the lakefront, but what will replace the industry that has left. This is the very question the City Council asked the ULI Advisory Panel, a nationally renowned panel of experts, to address. The ULI Panel Recommendation lays the groundwork for a comprehensive lakefront redevelopment plan."
53	10/7/2002	Waukegan City Council votes unanimously to re-zone the Coke Plant property from an industrial to a residential zoning classification.
54	10/17/2002	Waukegan Development Commission unanimously recommends denial of NSSD's conditional use and variance applications for its proposed sludge incinerator.
57	10/21/2002	Waukegan City Council unanimously denies the request by NSSD for a height variance and conditional use permit for the construction of the proposed lakefront sewage sludge incinerator.
56	10/21/2002	Waukegan City Council unanimously enacts a Solid Waste Nuisance Ordinance. The Ordinance mandates that polluters pay for cleaning property located within the "Lakefront Redevelopment Zone" (including the area in and around the Harbor) to residential standards. The Ordinance declared a "public nuisance" all soil within the Lakefront Redevelopment Zone contaminated above residential cleanup standards. On 7/7/2004 the Ordinance was amended to extend the boundary of the "Lakefront Redevelopment Zone" to the northern boundary of the City.

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57	11/12/2002	Waukegan City Council appoints a 10-person "Harbor City Renaissance Commission" to assist City officials through the lakefront redevelopment process.
58	11/18/2002	Waukegan City Council extends the November 19, 2001 moratorium on lakefront development for an additional year, noting the City's recent acquisition of the Coke Plant property and the findings and recommendations of the ULI Advisory Panel.
	11/26/2002	Harbor City Renaissance Commission conducts final interview and unanimously recommends that the Waukegan City Council select Skidmore Owings & Merrill as master planner for the downtown and lakefront.
59	12/4/2002	Harbor City Renaissance Commission holds Public Forum I, "From Brownfields to Greenfields, Green Lawns and Playing Fields: Environmental Issues Affecting the Lakefront Redevelopment." Among the themes explored in this Forum, it was "time to take control of our own destiny." Specifically, the Forum discussed the Kinder-Morgan Power Plant, the NSSD Sludge Incinerator, OMC bankruptcy, and the efforts of USEPA and the PRPs to force the City to accept an industrial cleanup at the Coke Plant property.
	12/16/2002	Waukegan City Council approves contract with Skidmore Owings & Merrill to serve as master planner for the downtown and lakefront.
60	12/31/02	One of the year's top news stories in Lake County: Waukegan's aggressive pursuit of its effort "to transform the lakefront from a post-industrial hodgepodge into a residential and recreational haven."
61	1/9/2003	Waukegan obtains option for purchase of OMC North Plant property and begins to negotiate agreement with USEPA and Illinois EPA whereby the City can take title and abate a public nuisance, but not assume environmental liability.
	1/15/2003	Harbor City Renaissance Commission holds Public Forum II, "Recreational and Arts Opportunities in Waukegan's downtown and lakefront, at the New Harbor City".
62	2/7/2003	Larsen Marine sends correspondence stating that it wants Harbor industries' voice heard in the planning process for the lakefront.
63	2/11/2003	Harbor City Renaissance Commission holds the first of a series of four public visioning sessions to obtain community input into the development of the downtown/lakefront redevelopment plan.

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Tab No.	Date	Description
64	2/11/2003	North Shore Gas informs Waukegan of its intent to clean up the North Coal Gasification Plant (also known as the "Tar Pits") and South Coal Gasification Plant to an industrial standard. The City responds by reminding North Shore Gas of the requirements of the City's Solid Waste Nuisance Ordinance.
65	2/15/2003	Waukegan News Sun reports "[Mayor] Hyde vows 'fight to end' over NSSD sludge plant".
66	2/18/2003	Waukegan New Sun reports "Waukegan draws line - Confrontation moves to court as city vehicles block construction at lakefront." Article states that in response to NSSD's unilateral decision to commence construction of the sludge plant on a court holiday, "The entrance to the North Shore Sanitary District's Pershing Road complex took on the look of Checkpoint Charlie Monday as city officials ordered a small fleet of municipal vehicles to block the expected start of construction on a controversial sludge processor."
67	2/27/2003	Waukegan issues Notice of Intent to Sue under federal environmental laws and its Solid Waste Nuisance Ordinance to lakefront area property owner.
68	2/28/2003	Skidmore Owings & Merrill issues "Summary Assessment - Waukegan Lakefront - Downtown Master Plan/Urban Design". Assessment rejects an industrial/commercial use for the Coke Plant property.
69	3/5/2003	Judge Walter, Lake County Circuit Court, issues a preliminary injunction barring the NSSD from proceeding with construction of the sludge incinerator and remands the matter to the Waukegan City Council for further proceedings relating to potential emissions from the proposed incinerator.
70	3/15/2003	Harbor City Renaissance Commission and the Skidmore Owings & Merrill team hold a Public Forum. Session. The session begins with a presentation entitled "Establishing First Principles". The Ninth Planning Principle established for the lakefront is to, "Create a Vibrant, Mixed-Use Harborfront District as an Extension of Downtown." (Slide No. 36) Skidmore Owens & Merrill was followed by a summary of the public visioning sessions presented by Noelle Kischer, Senior Planner for Waukegan. This included, "What the public told us they see for the future of Waukegan's downtown and lakefront." For the North Lakefront (which includes the Coke Plant property), the public expressed a desire for "Housing: condos, single family". The City did not receive any public comments advocating an industrial use at the Coke Plant property. Slide No. 58.



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71	4/12/2003	Renaissance Commission, City Planning Department and Skidmore Owings & Merrill hold Master Plan Workshop on the future of the downtown and lakefront.
	4/23/2003	Renaissance Commission holds Forum IV on "New Harbor City – Impact on Waukegan, County and Region". Featured speakers are: James C. LaBelle, formerly Lake County Board Chairman and current Senior Advisor to Chicago Metropolis 2020, and George A. Ranney Jr., President and CEO of Chicago Metropolis 2020.
72	5/7/2003	NSSD announces decision to abandon its effort to build its proposed sewage sludge incinerator on the Waukegan lakefront and relocate the project to Zion.
73	5/9/2003	Mike Higbee, a member of both the ULI Services Panel that visited Waukegan and of the Skidmore Owings & Merrill team, writes to Tomlin regarding the Coke Plant property and the North Harborfront: "A market for residential and lakefront commercial development is strongly evident once the land has been positioned to receive it." Higbee concludes that, "A transition from industrial and semi-industrial uses to residential and mixed-use development in the North Harborfront reflects the desirability and hence potential value of the immediate lakefront and lake view properties. Development of this area with medium-density residential and mixed-use will also contribute significantly to enhancing the downtown viewshed of the lakefront."
74	5/18/2003	USEPA issues "special notice" letter to the City, asserting that Waukegan is a "potentially responsible party" at the Coke Plant property. USEPA threatens sue the City it does not agree to abandon plans for a mixed use residential development on the Coke Plant property.
75	5/30/2003	USEPA Home - Region 5 - Superfund Division - NPL Fact Sheets - Illinois - "[T]he City of Waukegan has purchased the [Coke Plant property] and has reportedly acquired options on portions of the OMC Plant 2 property. The [Coke Plant property] has been rezoned to high-density residential and the city and other entities are working to revitalize the Waukegan lakefront; therefore, <u>land-use assumptions in the vicinity of the site may be changing in the coming years.</u> " (Emphasis added)
76	6/13/2003	Illinois Appellate Court affirms the City's authority to require the NSSD to comply with zoning ordinance and building code.
77	6/17/2003	Agreed Dismissal Order entered in the litigation involving the NSSD's proposed sludge incinerator. This brings to an end 19 months of litigation between Waukegan and the NSSD. Waukegan was ultimately successful

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		in combating the NSSD's effort to re-industrialize the lakefront.
78	6/23/2003	Skidmore, Owings & Merrill LLP, Conservation Design Forum, Site Design Group, Ltd., US Equities Land Strategies, Inc., Development Concepts, Inc. and C.H. Johnson Consulting present the <i>Final Waukegan Lakefront - Downtown Master Plan / Urban Design Plan</i> . The future use of the North Harborfront (which includes the Coke Plant property) is designated a "Residential - Mixed Use" District. (Discussion of the North Harborfront begins at Slide 39.)
79	7/1/2003	Waukegan City Council unanimously adopts "A 21st Century Vision for Waukegan's Downtown and Lakefront" (the "Master Plan"). A depiction of the property currently occupied by National Gypsum (one of three industries for who's benefit USEPA now wants to spend an additional \$25.4 million on a dredging project) is designated for "Marina-Related Use", "Future Boat Launch" and "50' Continuous Public Edge". (Master Plan, p. 21) The text accompanying the depiction of the North Harbor property currently occupied by National Gypsum states, "With the closing of key manufacturing plants, and reduced dependence on lake-based shipping, development adjacent to Waukegan's harbor will shift to a more diverse mix of recreational, residential and commercial uses. The Master Plan expands and enhances this evolution by proposing mixed-use, marina-based development that will re-define Waukegan's harbor for the next century." (Master Plan, p. 21) Another rendition of the Harborfront and North Harbor depicts the property currently occupied by the National Gypsum wallboard plant as being replaced with a Marina and a mix of residential and commercial uses. (Master Plan, p. 23) The text describing the Harborfront and North Harbor further states that "material storage, distribution and industrial operations" will be encouraged to relocate away from the North Harbor after 5 years. (Master Plan, p. 24)
80	7/15/2003	Northeast Midwest Institute conducts a "survey", funded in part by USEPA, purporting to assess community attitudes toward the "Waukegan Harbor Area". This survey is subsequently cited as authority for the proposition that cleanup of the Harbor sediments will increase property values in the City (or the "region") by hundreds of millions of dollars (the amounts cited have ranged from \$200 to \$800 million). It is clear that the survey inquired about attitudes concerning the "Waukegan Harbor Area", not the contaminated sediments in the Harbor.
81	7/17/2003	City submits an application to USEPA for Amendment of the ROD issued on September 30, 1999 for the Coke Plant property. The application states, "We submit this Application for ROD Amendment in furtherance of the USEPA's stated objective to work in partnership with Waukegan to realize the goals and objectives of the community for redevelopment of

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		the lakefront. The remedy selected in the ROD is contrary to these goals and objectives. The industrial clean-up standard which the ROD envisions is inconsistent with the results of the cumulative efforts over the last four years of private citizens and public officials, at every level of government, to achieve a rehabilitated and revitalized lakefront in Waukegan."
82	7/29/03	Barbara Wells of the Northeast-Midwest Institute publishes a report, again funded in part by USEPA, entitled "Case Studies: Integrating Sediment Cleanup and brownfield redevelopment". The report claims that "all of [Waukegan's] economic activity and municipal services depend in some manner on the harbor." According to the report, the dredging project will "revive the area's industrial base". The report describes a Harbor and economic conditions that have not existed since the 1960's. It is clear that the report's author is unaware of, or has chosen (or been directed) to ignore the Master Plan and the history outlined in this chronology. (Report, p. 14)
83	9/28/2003	In an exchange of correspondence between the City's attorney and Professor Braden, the author of the Northeast Midwest Institute reports, Professor Braden conceded that the "stigma" discussed in his report refers to the contaminated land on the lakefront, not contaminated Harbor sediments. Professor Braden's finding of "economic benefit" is consistent with those in the ULI Final Report and the City's Master Plan. Despite this acknowledgement by Professor Braden, his work continues to be mis-cited as "authority" for the "economic benefit" to the City (and region) the will derive from dredging the Harbor.
	10/1/2003	Northeast Midwest Institute issues another report entitled "Local Benefits From Cleaning Contaminated Sediments" again making the unsupported assertion that cleanup of the Harbor sediments (as opposed to the contaminated land) will provide significant economic benefits for the City.
85	4/16/2004	City Council rejects disposal of PCBs in Yeoman Creek Landfill. News Sun reports, "Some aldermen say they suspect that the cleanup project is just a way to get the city to swallow a deep dredging project." "What is evident is that this is a dredging project and not a cleanup project," said Ald. Rick Larsen (8th). "We could do some cleanup of the harbor--if that is what their true intent is--without deep dredging." In addition to concern over the safety of placing the PCB sediments at the landfill (and the added cost to the City of doing so), the City Council expressed concern that the ACOE dredging project would open the harbor to more industrial shipping at a time when the City is attempting to redevelop the harbor as a mix of recreational, commercial and residential uses.

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86	5/7/2004	In a letter to Congressman Kirk, Mayor Hyde expresses the desire of the City to achieve cleanup of the Harbor in a manner that advances the goals of the Master Plan. The Mayor emphasized that he and the City Council will select the Harbor cleanup plan “that makes the greatest contribution towards implementation of the Waukegan Downtown and Lakefront Master Plan.”
87	9/28/2004	USEPA issues an Explanation of Significant Differences (“ESD”) from the 9/23/1999 Coke Plant ROD. The ESD acknowledges the anticipated “future use” of the Coke Plant property <u>has changed from industrial to mixed commercial, residential and marina-related (Mixed Use Development) uses in accordance with the Master Plan.</u> To accomplish this objective the ESD establishes five conditions for a Mixed Use Development at the Site: (1) adherence to the provisions of the Soil Management Plan; (2) placement of at least three feet of clean soil cover, or its equivalent, over the areas of the Site where the redevelopment does not include buildings or other direct soil exposure barriers (e.g., paved surfaces, landscaping above current grade, sidewalks; (3) use and maintenance of other engineered barriers such as pavement and building foundations; (4) incorporation of vapor control barriers into the design of foundations for inhabited buildings and (5) placement of institutional controls on the Site prohibiting use of groundwater as a potable water supply.
88	10/13/2004	USEPA, Illinois EPA, General Motors, North Shore Gas and the City enter into a Consent Decree that requires the PRPs to enhance the soil cleanup mandated by the ROD to allow for residential redevelopment of the Coke Plant property, consistent with the Master Plan. The residential redevelopment incorporates “engineered barriers” and other details to be spelled out in a “Soil Management Plan”.
89	3/1/2005	The City Council adopts “Design Guidelines Waukegan Lakefront - Downtown Master Plan”. The purpose of the Guidelines is to (1) define the overall design approach for districts and building types; (2) confirm community goals for the design and quality of new development; (3) establish clear rules for neighborhoods, blocks, lots, buildings, streets, and open spaces; (4) Provide clarity to private development interests about the physical and design framework within which they will be required to work; (5) Provide confidence to private development interests that neighboring properties will follow common standards; (6) Provide a promotional tool for inclusion in requests for proposal; and (7) unite the City in its evaluation of development proposals. With respect to the Harborfront, where deep draft vessels deliver commodity products, the Design Guidelines are specific and clear, stating that, “Existing light industrial uses throughout the [Harborfront] district must meet city, state, and local performance standards related to noise, odor, dust and

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		emissions. In the long term, these uses should be <u>phased out or relocated</u> as they may be incompatible.” (p. 18) With respect to the North Harbor, the future use of the National Gypsum property is designated as “Marina-related”, not industrial. (Graphic at p. 23)
90	6/23/05	The City enters into a Consent Decree with USEPA and Illinois EPA which establishes conditions for the City assuming ownership of the OMC North Plant (Plant 2).
91	8/1/2005	The City Council enacts Ordinance No. 05-O-113, a text amendment creating the downtown and lakefront "overlay district" and map amendment to the Zoning Ordinance applicable to all properties located within the overlay district. The overlay district consists of the downtown and entire lakefront (including the Harbor area). The ordinance applies the Design Guidelines to all projects proposed for downtown and on the lakefront (and grants staff limited discretion to deviate from the Guidelines).
92	9/30/2005	The City takes title to the former OMC North Plant (Plant 2). The City now controls approximately 100 acres of lakefront property facing onto both an inner harbor and Lake Michigan. The City's total cost of acquisition: approximately \$100,000.00. The City is now the largest single landowner within both the Harborfront and North Harbor (as those areas are designated in the Master Plan and Design Guidelines).
93	10/27/2005	The City's Master Plan receives the 2005 Burnham Award for Excellence in Planning. In 2005 and 2008 the City also received the Congress for the New Urbanism 2005 Charter Award and the Burnham Plan Centennial/Chicago Metropolis 2020 Award for Master Plan/Open Space Implementation. Metropolis 2020 noted the “widespread public support for the plan” and “thoughtful, inclusive planning process” that sets forth a bold vision for the “largest piece of vacant Lake Michigan lakefront between Chicago and Wisconsin as a recreational, residential and commercial ‘harbor city’.”
94	4/1/2006	USEPA issues <i>REMEDIATION INVESTIGATION REPORT</i> for the former OMC North Plant (Plant 2), now owned by the City. In contrast to its 9/20/1999 ROD for the Coke Plant property, and consistent with the findings in the ESD dated 9/28/2004, the USEPA now concedes that the anticipated future use of the North Plant property is, as provided for in the Master Plan, <u>mixed use residential and recreational, not industrial</u> . (See Report, for example, pp. vii, viii, TABLE ES-1 (Summary of Estimated Health Risks for Site Chemicals), 3-15, 3-21, 3-29, 4-9, 4-11, 5-2, 5-3 and 5-5.) This future use determination is made in accordance with the requirements of the 1995 Land Use Directive (referenced previously in this chronology). In making this future use determination,

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		USEPA followed the Waukegan Lakefront - Downtown and Lakefront Master Plan and supporting documents prepared by Skidmore, Owings & Merrill, LLP. According to the Report, "The Master Plan and documents provided by the City of Waukegan were reviewed with respect to the anticipated future land use of the OMC Plant 2 and surrounding properties." (§2.1.2, Future Land Use, p. 2-1). See also <i>FEASIBILITY STUDY REPORT</i> for OMC Plant 2 dated December 2006 (Future Use, p. 1-7); ROD Summary for OMC Plant 2, "EPA Proposes First Cleanup Plan for the Outboard Marine Corp., Inc. Plant 2 Site" (December 2006) (acknowledging future residential use); Record of Decision issued for Plant 2 building, soil and sediment media dated 9/1/2007, Section VI.F ("The city has published its master plan for redevelopment (see Figure 7) on its website and officials have recently stated that in another 15-20 years perhaps "8000-10,000 people" will be living on the lakefront where no residents are living now").
	6/19/2006	City enters into contract with Lake County Grading to demolish die caste building located at the east end of the OMC North Plant (Plant 2). With the demolition of this structure the eastern half of the North Plant, along with the Coke Plant property, is now ready for a mixed use residential development as contemplated by the Master Plan. On 6/21/2006 the City notified USEPA and Illinois EPA that demolition was to commence.
95	11/10/2006	Exchange of e-mail between the City and USEPA on whether the dredging project proposed by USEPA will result in "delisting" the Harbor as an "area of concern" (the reason the City Council was considering the proposal). USEPA advises the City that there can be no "guarantee" that cleanup objectives will be achieved and the Harbor "delisted".
96	1/5/2007	The City, General Motors, North Shore Gas, Illinois EPA and USEPA enter into an agreement authorizing relocation of the groundwater treatment plant from the Coke Plant property to the "Triax Building" on the OMC North Plant (Plant 2). The groundwater treatment plant, if not relocated, would have delayed residential redevelopment of the Coke Plant property.
97	2/7/2007	The City's consultant, Conservation Design Forum, prepares a conceptual design for an EcoPark along the north side of the OMC North Plant (Plant 2) as contemplated by the Master Plan. A large area of ecological features and pedestrian trails contemplated by ULI and the Master Plan, and outlined in the concept by Conservation Design Forum, would be taken up by the "berm" USEPA proposes to construct on the north side of the North Plant with the dredged Harbor sediments.
98	3/1/2007	The U.S. Army Corps of Engineers ("ACOE") issues an extensive report on the contribution of recreational boating to the economy of the Great

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		Lakes Region entitled “John Glenn Great Lakes Basin Program, Great Lakes Recreational Boating”. In the report (p. 78) the ACOE predicted that the status of Waukegan Harbor would change to “recreational”.
99	3/21/2007	LFR Opinion Letter – Capping Harbor is a feasible and cost effective alternative to dredging.
100	4/30/2007	Letter from Illinois EPA Director Doug Scott: capping is an accepted technological practice.
101	5/1/07	Letter from Brownfield Restoration Group, LLC: dredging Harbor will entrench existing industrial development. City is better served by capping the sediments.
102	5/4/2007	Letter from Michael MaRous debunking reliance on Northeast Midwest Institute “reports”: There is no reliable manner to quantify the effect upon property values from remediation of Harbor sediments.
103	5/7/2007	Waukegan City Council enacts Resolution No. 54 with respect to the Harbor dredging project, requesting enactment of legislation by Congress that would enable the dredging project to proceed in a manner that advances implementation of the Master Plan (de-industrialization of the Harbor and lakefront).
104	05/08/2007	Congressman Kirk transmits draft legislation to the City that would limit the depth of the Harbor and allow the dredging project to proceed in a manner that advances implementation of the Master Plan.
105	5/23/07	The City sends letter to USEPA notifying the Agency that the City is willing to proceed with the design of a dredging project for the Harbor under the Great Lakes Legacy Act. The letter concludes, “However, as we have discussed, the City's participation as the non-federal sponsor in the actual implementation of the dredging is dependant on passage of federal legislation acceptable to the City Council that will transform the harbor from an industrial to a recreational harbor.”
106	5/31/2007	In an email to USEPA, the City again emphasizes that both parties are entering into the project agreement under the Great Lakes Legacy Act to design a dredging project for the Harbor with “their eyes wide open”. The City will not proceed with the dredging project absent the legislation promised by Congressman Kirk.
107	6/1/2007	Milwaukee Journal Sentinel article: “One city wants harbor that's all play, no work. Great Lakes have long history of cargo shipping, but recreational boating now is a major economic force.” The focus on the article is Waukegan’s embrace of recreational, residential and retail

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		development on the lakefront. The article, referencing the March 2007 ACOE report "John Glenn Great Lakes Basin Program, Great Lakes Recreational Boating", also explains the economic benefit of recreational boating and harbors to the economy of the Great Lakes.
108	6/9/2007	Article appears at OceanNavigator.com: "Ships not wanted on the Great Lakes?" The article states that, "In May, the Waukegan, Illinois, city council unanimously voted to ban commercial activity in the city's Lake Michigan harbor and promote recreational boating instead. According to a federal study on the economic value of recreational boating on the Great Lakes, recreational boating brings substantial revenues and municipalities should promote it. According to the report, Great Lakes boaters: Spend \$2.35 billion a year on boating trips. Spend \$1.44 billion a year on boats, equipment and supplies. Create 60,000 jobs with \$1.77 billion in personal income." The article notes that the Great Lakes Boating Federation, with 4.3 million members, "applauded the City Council of Waukegan, Illinois, for unanimously voting to convert its lakefront from an antiquated fixture of old industry into a hub of public access and a haven for leisure activities."
109	06/14/2007	Congressman Kirk sends letter to U.S. Senator Richard Durbin, endorsing transition of the Harbor from an industrial to a recreational harbor and seeking support for the Kirk Legislation.
110	6/14/2007	U.S. Department of Commerce threatens to seek recovery of \$1.2 million grant towards the cost of lowering the City's waterline in the Harbor because the City seeks a recreational harbor.
111	6/20/2007	The City was forced to sign a Consent Decree to reimburse USEPA for the cleanup of the former "Shooting Range Site" that was contaminated with asbestos. In 1958 the U.S. Army built a shooting range on the lakefront to host the shooting competition for the PanAmerican Games in 1959 on property owned by Johns Manville and the City. The "berms" for the shooting range were constructed of asbestos debris from Johns Manville. In September 2007 the City paid the USEPA \$1,382,000 (37% of the cleanup cost). The USEPA demanded payment because the City was an "owner" of a portion of the site. In April 2007 the City asked for a "payment schedule" that would allow the City to pay the \$1.3 million to USEPA in installment payments, with interest. USEPA rejected this request and demanded immediate payment. In contrast, the Army, which designed and constructed the Shooting Range Site, was only required to pay its 20% share (\$750,000) "as soon as reasonably practicable", and then only if Congress approved the payment.
112	7/27/2007	Ray Vukovich, the City's Director of Government Services, transmits Project Agreement for Environmental Dredge of Waukegan Harbor



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		signed by Mayor Hyde to USEPA. The City has added conditions precedent language. Mr. Vukovich explains that, "For the past two ½ months, we have made it clear to USEPA that the Project Agreement must be contingent upon enactment of Federal legislation satisfying the conditions of the Resolution unanimously adopted by the Waukegan City Council on May 7, 2007. On Monday, July 16, 2007, the city council was to vote on an Ordinance that would have authorized the Mayor to sign a Project Agreement that was contingent on, among other things, enactment of the Federal Legislation."
113	8/6/2007	The Waukegan City Council adopts ordinance No. 07-0-06, authorizing the Mayor to enter into a project agreement with USEPA to undertake a dredging project of the Harbor under the Great Lakes Legacy Act ("GLLA") containing certain conditions, including enactment of the federal legislation promised by Congressman Kirk.
114	8/8/2007	News Sun runs article: "Closing of remaining lakefront industries five to 15 years away". Congressmen Kirk is quoted to say ""My view...is we're going to back whatever the city of Waukegan wants."
115	8/22/07	USEPA issues a press release stating the City's conditions relating to adherence to the Master Plan are irrelevant, as they "have nothing to do with restoration".
117	8/31/2007	Article appears in Detroit Free Press: "Turn tide toward recreational boating." The article criticized Sen. Carl Levin, D-Mich., as stating "Levin said nothing about the needs of the 4.3 million registered boaters who bring \$16 billion in economic activity to the Great Lakes region -- nearly four times that generated by commercial navigation. This sector is also hurting for lack of dredging, but these small harbors are off limits for the Corps of Engineers." The article made specific reference to Waukegan Harbor, stating, "Earlier this year, the city council of Waukegan, Ill., voted unanimously to convert its lakefront from an antiquated fixture of old industry into a hub of public access and a haven for leisure activities. The vote to ban commercial vessels from the Waukegan harbor is a positive step for the economic vitality and environmental health of the community. The Great Lakes Boating Federation believes the Waukegan decision represents the opening of a floodgate as more cities realize the enormous benefits of converting waterfronts to support recreational boating and other forms of public access. Trends indicate that the rate of loss of the Midwest's industrial base is increasing. Thus, many coastal economies will need to fill the void left by departing industries. The prospect of economic growth in the service and leisure sectors far exceeds that for expanding the industrial base."

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117	9/4/2007	The City's environmental consultant confirms with USEPA's consultant, CH2M Hill, that there is a significant question as to whether the dredging project will achieve cleanup objectives.
	9/5/2007	City files suit against Harbor industries (the "Harbor Litigation"), identifying them as PRPs in connection with the cleanup of the Harbor and surrounding areas.
118	9/28/07	USEPA terminates the GLLA project design agreement and refers the Harbor to the federal Superfund program.
119	10/17/2007	The News-Sun runs an article in which it describes the Waukegan City Council as "steadfast with the plan for Waukegan Harbor redevelopment to exclusively accommodate residential and recreational uses."
	10/25/2007	The City posts a Position Paper on Waukegan Harbor at its web site ( <a href="http://www.waukeganweb.net/waukegan%20harbor%20clean%20up/waukeganharborpositionpaper.htm">http://www.waukeganweb.net/waukegan%20harbor%20clean%20up/waukeganharborpositionpaper.htm</a> ). The Paper states that, "It is understandable that the City of Waukegan wants to implement a Master Plan that will move the harbor from the twentieth into a twenty first century world economy. It is also understandable why the City is unwilling to participate in a \$39 million + project that U.S. EPA's own consultant has serious reservations will achieve U.S. EPA's cleanup objective - particularly when the only justification for the most expensive, least reliable dredging option is that it is necessary to maintain a deep industrial harbor that is inconsistent with the City's Master Plan. Perhaps this political gridlock over the cleanup of the harbor is inevitable until an accommodation is reached between two competing views of the future of the lakefront." The Paper cautions that, "Maintaining the harbor as a deep industrial harbor should not be a predetermined outcome that censors honest and open scientific discussion. Perhaps unwittingly, this is exactly what U.S. EPA has allowed to happen."
120	11/6/2007	Mayor Hyde and the City Council send a letter to the Waukegan News Sun responding to a 10/30/2007 letter from Mary Gade at USEPA, Region 5. The Mayor explained the City's reservations concerning whether the \$39 million dredging plan would achieve the cleanup standards and recommends an engineered cap which, according to USEPA, would cost between \$10 and \$13 million. The letter further states that the job of USEPA is to implement cost-effective cleanup plans, not to take sides on political questions, such as the future use of the Harbor.
121	12/3/2007	USA Today article: "Great Lakes see a future beyond industry." The article states that the conflict over the future of Waukegan Harbor "symbolizes the dramatic changes sweeping across the five Great Lakes,

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		a region that is trying to reinvent itself in a way that could have major implications for the nation. Attitudes about the Great Lakes have changed so drastically during the past three decades that manufacturers are finding themselves unwelcome even in cities they once ruled.”
122	12/13/2007	USEPA announces its revised plan for the cleanup of the Fox River. USEPA states that “based on many tests and past cleanup projects on other bodies of water, the capping method is just as safe as dredging the toxic sediment.”
123	5/13/2008	The City files a Second Amended Complaint against the Harbor industries. One of the City’s allegations is that some of the parties own the bottom of the North Harbor (where PCB-contaminated sediments are located). As owners of contaminated land, the companies are liable for cleanup costs under the Superfund statute.
124	5/19/2008	Waukegan City Council enacts Ordinance No. 47, prohibiting the use of groundwater as a potable water supply. This is to facilitate residential redevelopment of the Coke Plant property and OMC North Plant (Plant 2), as contemplated by the Master Plan and required as a condition of the Consent Decrees between the City and USEPA.
125	6/20/2008	News-Sun runs article: “Link sinks Washington's push for industry-friendly harbor.” The article quotes State Senator Terry Link as stating, "I want the harbor capped and the city wants it capped. We don't want it dredged." Three of the defendants in the Harbor Litigation had previously given State Representative Washington \$17,500 in campaign contributions.
126	7/11/2008	In a letter to the News-Sun, State Senator Terry Link states, “[City] Council members are looking out for the future development of the city of Waukegan and the growth it will need to sustain local services. Many major cities throughout Illinois and the United States have moved toward redeveloping industrial sites to residential and retail redevelopments with great success. Waukegan has the potential and the drive to develop and enhance the harbor for this purpose. This development would provide a needed influx of new property tax and sales tax revenues -- well over and above the current revenues paid by industry using the harbor. Redevelopment of the harbor is good for the city of Waukegan and I am glad to be able to work with the City Council in their forward-thinking efforts.”
127	8/8/08	The City learned that USEPA had various meetings with “harbor industry” throughout the summer concerning the proposed remedial plan for the Harbor, but that USEPA had elected not to call the Mayor or any member of his staff. The City therefore submitted a Freedom of

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Tab No.	Date	Description
		Information Act ("FOIA") request to USEPA for "All documents of any kind, including, but not limited to, any and all communications, meeting notes, meeting minutes, meeting sign-in sheets, plans, proposals, drawings, and studies, from July 1, 2007 to the present, relating to or reflecting any planned or proposed removal or remedial action pursuant to the federal Superfund program, 42 U.S.C. 9601, et seq., in connection with Waukegan Harbor, including, but not limited to, any and all documents relating to or reflecting communications regarding such an action with the Waukegan Port District, National Gypsum Co., Bombardier Motor Corporation of America, LaFarge North America, Inc., LaFarge Building Materials, Inc., St. Marys Cement, Inc., and the office of Congressman Mark Kirk, or anyone acting or purporting to act on their behalf."
	8/12/2008	The City, North Shore Gas Company and USEPA meet to discuss cleanup levels for the "tar pit" site (a former manufactured gas plant site located north of Plant 2). The City emphasizes the importance of cleaning the site to the level necessary to accommodate the Moorland contemplated by the Master Plan. USEPA Attorney Peter Felitti reminds the City that the remedy selected under the Superfund statute must not only be consistent with the "reasonable anticipated future use of the property" as designated in the Master Plan, but must also be "cost effective".
128	9/18/08	The City submits comment on the second Record of Decision issued by USEPA for the former OMC North Plant. The second ROD addressed groundwater contamination. The purpose of the City's comments was to ensure that the City and USEPA work together to address any potential interference that pumping associated with the groundwater remedy may have on the residential redevelopment of the property.
129	10/1/2008	USEPA issues the Feasibility Study Report for the Harbor sediments. Unlike the prior decisions with respect to the Coke Plant property and OMC North Plant site, USEPA makes <u>no findings</u> with respect to the "reasonably anticipated future use" of the Harbor and the land surrounding the Harbor. The central question of whether there will be a continued demand for deep draft vessels from the little industry that remains on the Harbor, or whether the reasonably anticipated future use of the Harbor will be as a "recreational harbor as contemplated by the City's Master Plan", is ignored. Not a single reference is made in the Study to the Master Plan, the 1995 USEPA Land Use Directive (referenced previously in this chronology), or any consultation with "local land use planning authorities" and "appropriate officials", such as Mayor Hyde, City staff or the City Council. The USEPA Fact Sheet, "EPA Proposes Cleanup Plan For Harbor Pollution" is similarly silent on the

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Tab No.	Date	Description
		future use of the Harbor area.
130	10/20/2008	The Soil Management Plan for the Coke Plant property is finalized. This document sets forth the type of engineered barriers and other details required for development of the property as a mixed use residential development. The Soil Management Plan addresses three general categories of environmental controls that must be incorporated into a residential development: institutional controls, engineered barriers and soil management. The purpose of an institutional control, for example, is to assign responsibility for maintaining engineered barriers. Engineered barriers are structures that cover (prevent human contact) with contaminated soil. Soil management controls the manner of excavation and movement of soil on the property. Approval of the Soil Management Plan was the last step necessary for the City to issue Requests for Qualifications and Proposals for the mixed use development of the property. A combined RFQ/RFP is expected to be issued in the Spring of 2009.
131	11/13/08	USEPA holds a public meeting on the proposed \$35 remedial action plan for the Harbor. Kevin Adler, the USEPA Region 5 project manager, states that lawyers within USEPA are providing "conflicting opinions" on the issue of whether the President is authorized under the Superfund statute to place a remedial cap within a navigable channel. (Transcript, p. 18) Ray Vukovich, stated that the City prefers the \$9.6 million remedial cap over the \$35 million dredging alternative because the capping alternative "most closely aligns with City of Waukegan master plan for the lakefront." Vukovich also emphasized the importance of first cleaning up Plant 2 (which, if not cleaned, will re-contaminate the Harbor). (Transcript, p. 39) Adler agreed that money in the Superfund Program "is in short supply" and that "those pieces of the [OMC] site that have more potential risk to human health and environment would be funded first." Therefore, according to Adler, demolition and cleanup of OMC Plant 2 and cleanup of the groundwater at Plant 2 should be "ranked above" the cleanup of the Harbor sediments. (Transcript, p. 33)
132	11/14/08	Having learned of the "conflicting opinions" among lawyers at USEPA on the issue of the President's authority to place a remedial cap within a navigational channel (at a cost of \$9.6 million) or whether the President is legally obligated, by the Superfund statute or some other statute, to dredge the Harbor at a cost of \$35 million, the City submits a FOIA request for USEPA's legal analysis. The answer to this question appears to be the primary (if not only) basis for USEPA's selection of the \$35 million dredging option over the \$9.6 million capping option. The City did not receive a "response" to the FOIA request for the Agency's analysis of this \$25.4 million question until 1/26/09. The City is informed that USEPA's analysis of this issue – an analysis central to whether the

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		cleanup of the Harbor will cost \$35 million or \$9.6 million – is “confidential” and will not be disclosed to the public. See 1/26/09 entry in this chronology (below).
133	11/24/2008	In the Harbor Litigation, Federal Judge Matthew Kennelly rules that the Harbor industries “can be liable for the cost of cleaning up the OMC Superfund Site, which includes the Harbor and former North Plant.”
134	12/02/08	<p>The City submitted public comment to USEPA on the proposed remedial alternative for the Harbor on the following subjects:</p> <ul style="list-style-type: none"> <li>• According to the USEPA “Fact Sheet” on the Harbor cleanup plan, the dredging alternative will result in “important redevelopment benefits”. The City noted that the administrative record is completely silent on USEPA’s basis for drawing such a conclusion.</li> <li>• The City reminded USEPA about Mr. Adler’s comments at the 11/13/08 public meeting, when the City first learned of the “conflicting legal opinions” within USEPA concerning the President’s authority to place a remedial cap in a navigable channel.</li> <li>• The City concluded, “In sum, USEPA’s preferred dredging alternative is based on economic and legal rationales.”</li> <li>• The City noted that it has submitted FOIA requests to USEPA for documents pertaining to these issues (as the administrative record at present is silent). The City explained that it is unable to provide meaningful comment “without understanding the economic and legal analysis underpinning USEPA’s selection of dredging over capping the Harbor.”</li> <li>• The City assumed that USEPA would provide a timely response to its FOIA request; but if not, the City reserved the right to request an additional extension of the public comment period so as to be able to provide meaningful comment.</li> <li>• The City enclosed a November 19, 2008 e-mail from USEPA committing to greater involvement by local governments in USEPA’s decision-making process. The City noted that this commitment reaffirmed the Executive Order on Federalism issued by President Clinton on August 4, 1999. In light of these directives, the City expressed concern that the USEPA had made no effort to consult with the City concerning the Harbor remedial alternative, even though USEPA has long been aware of the City’s concern that the dredging alternative conflicted with the City’s Master Plan. The City noted, however, that USEPA thinks it appropriate to consult with</li> </ul>

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		Harbor industry concerning the remedial alternative for the Harbor.
135	12/5/08	Tomlin issues a Staff Report to the Waukegan Development Commission concerning a request for conditional use permit/overlay district approval. (See Ordinance No. 05-O-113, dated 8/1/2005, a text amendment creating downtown and lakefront "overlay district" and map amendment to the Zoning Ordinance referenced in above in this chronology.) The Staff Report recommends approval of a Mixed Use Residential use consisting of Courtyard Homes, Single Family Residences and Town House Lakeview Condos in the area designated as the "South Lakefront" in the Master Plan and Design Guidelines.
136	12/12/2008	The City issues a press release regarding Judge Kennelly's November 24, 2008 decision. The Mayor pointed out that as "owners" under the Superfund statute, "The School District has paid 10% of the \$26 million Yeoman Creek Landfill cleanup solely because it owns land under the landfill. Just last year, USEPA required the City to pay \$1.3 million for the cleanup of City owned land that Johns Manville contaminated with asbestos." The Mayor concluded by stating, "It's important that everybody play by the same rules."
137	1/2/09	<p>The City sends a letter to USEPA (in follow-up to the 12/2/08 communication above). The City explains that it has not received a response from USEPA to its FOIA requests for documents relating to the claimed "important redevelopment benefits" of the dredging alternative and "conflicting legal opinions" within USEPA concerning the President's authority to place a remedial cap in a navigable channel. The City states further that, according to USEPA, the City will not receive a response to its FOIA requests until 1/25/2009 (10 days before the 2/4/09 deadline to submit public comment). Given the delay in USEPA's response to two such central issues to the selection of the remedial alternative, the City requests that the public comment period be extended until 3/4/09. The City stated, "It is unrealistic and fundamentally unfair for USEPA to expect City staff to review documents received on January 25, 2009, confer with the City Council and submit comments to USEPA by February 4, 2009." The City then submitted specific public comment to USEPA on the proposed remedial alternative for the Harbor on the following subjects:</p> <ul style="list-style-type: none"> <li>• USEPA has failed to make a "future use" determination (as required by the 5/1/1995 "Superfund Land Use Directive" referenced in this chronology above). USEPA has made "future use" determinations for every other Operable Unit at the OMC Site prior to selecting a remedial alternative. However, for some reason, USEPA chose to ignore the Superfund Land Use Directive when selecting a remedial alternative for the Harbor. The City asked, "How is USEPA to</li> </ul>

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		<p>determine the reasonably anticipated future use of the submerged land in Waukegan Harbor without considering the future use of the land surrounding the harbor?”</p> <ul style="list-style-type: none"> <li>• The City pointed USEPA to the specific sections in the Superfund statute that authorize the President to place a remedial cap in a navigable channel. The City stated that it assumed the referenced language is the cause of the “conflicting legal opinion” to which Mr. Adler referred at the 11/13/2008 public meeting.</li> <li>• The City urged USEPA to exercise caution in basing its decision on subjective judgments concerning “community acceptance” of the dredging alternative. The City expressed the view that disregarding the long stated preference of the Waukegan City Council for the capping alternative, the democratically elected representatives of the residents of Waukegan, on the basis of USEPA’s subjective assessment of “community acceptance” raises serious questions of federalism. The City stated that the must reliable means of assessing “community acceptance” of the preferred remedial alternative for the Harbor is to consult with state and local elected representatives.</li> </ul>
138	1/2/09	The City asked USEPA whether a federal lien pursuant to the Superfund statute, 42 U.S.C.A. 9607(l), would be assessed against owners of the “OMC Site”. The request enclosed a copy of Judge Kennelly’s 11/24/08 opinion, finding that owners of land in the Harbor may be held liable as “owners” under Section 107(a)(1) of CERCLA, 42 U.S.C. 9607(a)(1).
139	1/12/2009	The City asks USEPA to respond to the 1/2/09 request to extend the public comment period until 3/4/09..
140	1/14/2009	The City, Larsen Marine, Illinois EPA and USEPA enter into an agreement authorizing redevelopment of the former Slip 3 in the North Harbor (now a PCB containment cell) as a boat storage facility. The agreement provides Larsen Marine with needed boat storage capacity and frees up land on the former Coke Plant property for residential development.
141	1/16/2009	In an article entitled “Council advances lakefront ordinances”, the News-Sun reports that, as the first step in amending the City’s Zoning Ordinance to conform to the Master Plan, the south lakefront is rezoned from industrial to a residential zoning classification.
142	1/16/2009	The National Oceanic and Atmospheric Administration informs the City that an internal review of the President’s authority under the Superfund statute to place a remedial cap within a navigable channel is confidential



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		and exempt from public disclosure.
143	1/20/2009	<p>The Waukegan City Council adopts a Resolution stating, “[T]he question is not whether the City Council desires to cooperate in the cleanup of the PCB contaminated sediments remaining after USEPA’s 1992 cleanup effort, but rather ensuring that the next cleanup is –</p> <ul style="list-style-type: none"> <li>• cost effective;</li> <li>• protective of human health and the environment; and</li> <li>• advances implementation of the City Council’s “21st Century Vision for Waukegan’s Downtown and Lakefront” (Master Plan).</li> </ul> <p>The Resolution endorsed the capping alternative and rejected the dredging alternative. The Resolution directed the “Mayor to present this Resolution to the City’s Congressional Delegation and State Senator Terry Link and requests their assistance in requesting that the Obama administration extend the public comment period and engage in a dialogue with the City concerning the Master Plan and the remedial plan for Waukegan Harbor.” The Resolution further provides, “In the event that the Obama Administration does not extend the February 4, 2009 deadline for public comment on the remedial plan currently proposed, the City Council directs Ray Vukovich, City staff and Special Environmental Counsel to submit written public comment to USEPA consistent with this Resolution and addressing the subjects itemized in Attachment 1 to this Resolution” as follows:</p> <ol style="list-style-type: none"> <li>1. CLEANUP PLANT 2 FIRST.</li> <li>2. THE CITY COUNCIL AND MAYOR SPEAK FOR THE CITY OF WAUKEGAN.</li> <li>3. THE FUTURE USE OF THE HARBOR IS FOR RECREATIONAL BOATING NOT INDUSTRIAL SHIPPING.</li> <li>4. DECISIONS CONCERNING REDEVELOPMENT OF THE LAKEFRONT SHOULD BE MADE BY THE CITY NOT USEPA.</li> <li>5. THE PRESIDENT HAS PLENARY AUTHORITY TO SELECT A REMEDY THAT CONFLICTS WITH OTHER FEDERAL, STATE AND LOCAL LAWS.</li> <li>6. THE HARBOR REMEDIATION WILL BE VERY COSTLY TO THE PUBLIC.</li> <li>7. THERE ARE POTENTIALLY RESPONSIBLE PARTIES TO PAY</li> </ol>

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		FOR THE CLEANUP OF THE OMC SITE.
144	1/20/2009	<p>On 1/15/09 USEPA replied to the City's 1/2/09 email concerning whether a Superfund lien would be imposed on parcels comprising the "OMC Site". USEPA stated that it had the authority under Section 107(r) of CERCLA, 42 U.S.C. 9607(r), to impose a "windfall" lien on the OMC North Plant (Plant 2) and the application of such a "windfall lien" is "within the sound discretion of USEPA". (See 6/23/2005 Consent Decree (referenced above), p. 12, ¶ 10.) USEPA did not respond to the City's questions concerning whether a lien under Section 107(l), 42 U.S.C. 9607(l), would be imposed on other parcels comprising the "OMC Site", specifically the submerged lands. The City responded to USEPA by a letter dated 1/20/09. The City reminded USEPA of its long stated (and published) position to impose §107(l) liens on all parcels comprising a Superfund Site. The City directed USEPA to its own policy documents on this issue (dated 5/22/2002 and 9/22/1997) which state, "Regional staff should seriously consider and analyze the use of liens <u>at every site in order to protect the government's financial interest.</u>" (Emphasis added) The City emphasized that "costs do matter", and that whether a lien is in the amount of \$9.6 million (for the capping alternative) versus \$35 million (for the dredging alternative) on parcels comprising the "OMC Site" has significant implications for the future redevelopment of the lakefront in accordance with the Master Plan. Based on USEPA's long stated policy (and Judge Kennelly's decision regarding liability of owners of submerged land), a lien for the cost of the Harbor cleanup could be imposed on any submerged parcel comprising the "OMC Site". The City urged USEPA to refrain from falsely representing to the public that the \$35 million dredging project is being funded with "free money" and has "important redevelopment benefits", as if Superfund were a "public works program". See discussion above in this chronology (4/7/1999 and 6/20/2007) regarding the liability of the Waukegan School District and City of Waukegan at the other Superfund sites. The City also asked why, in light of Judge Kennelly's 11/24/08 opinion, USEPA has not provided notice to owners of submerged lands in the Harbor of their potential liability for the harbor cleanup as required by Section 113 of the Superfund Statute, 42 U.S.C.A. 9613(k).</p>
145	1/22/2009	<p>The City pointed out that it was still waiting for a response to the City's 1/2/09 request that the public comment period be extended until 3/4/09. The City, reminding USEPA of President Obama's commitment to "transparent" government, again requested release of USEPA's documents on such critical issues as the "reasonably foreseeable future use" of the Harbor area and the "legal necessity" to spend \$25.5 million more on the dredging alternative than the capping alternative.</p>

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146	01/23/09	USEPA informs the City that the public comment period will not be extended past 2/4/2009. According to USEPA, the City has all the information it needs to comment on the proposed remedial alternative for the Harbor.
147	1/26/09	USEPA replies to an e-mail from the City in which the City referenced a directive from the President's Chief of Staff, Rahm Emanuel, that, absent an emergency, final action should not be taken on pending rulemaking activity and that 30 days of additional public comment should be provided for pending rules. According to Region 5, USEPA is not engaged in "rulemaking" when issuing a ROD and therefore not bound by the President's directive.
148	1/27/2009	Mayor Hyde sends a lengthy letter to Region 5. The Mayor remarks in a footnote that the issuance of a Record of Decision is clearly "rulemaking" and governed by the President's directive. Region 5's action "can only be characterized as an insubordinate refusal to abide by a Presidential directive." The Mayor enclosed the City Council's January 20, 2008 Resolution and requested a meeting with USEPA Administrator Jackson to begin "the dialogue requested by the City Council on how the City and USEPA will work together to achieve our common objectives."
149	1/27/2009	Tomlin provides his opinion concerning the reasonably anticipated future use of the North Harbor, Harborfront and Harbor area. Tomlin states that, "It is my professional opinion that the reasonably anticipated future use of the North Harbor will be mixed use, predominated by residential as defined by the Master Plan." Tomlin further explains that the process of rezoning the entire lakefront to conform to the Master Plan, including properties in the North Harbor area, has commenced and is expected to be completed in the first half of 2009.
150	1/28/2009	The City is informed by USEPA Region 5 that the "conflicting opinions" on the issue of whether the President is authorized under the Superfund statute to place a remedial cap within a navigable channel (to which Mr. Adler referred in the 11/13/2008 public meeting) has been designated "confidential" and will not be disclosed to the City. The City responds, "The problem created by [Region 5's] refusal to provide the requested information is that there is not a single document in the administrative record supporting the prior administration's constrained reading of the President's authority under the Superfund Statute. Whatever legal analysis the former administration undertook on this question (if any) has been designated 'confidential' and will not be disclosed to the public. Evidently, it is none of the public's business how (or if) the former administration answered this \$25.4 million legal question. This is hardly consistent with Administrator Jackson's 1/23/09 policy on transparency."

**USEPA SELECTION OF THE (SECOND) RESPONSE ACTION  
FOR CONTAMINATED SEDIMENTS IN WAUKEGAN HARBOR**

**CHRONOLOGY AND CONTEXT**

Tab No.	Date	Description
151	2/3/2009	USEPA replies to Mayor Hyde's January 26, 2009 request for an extension of the public comment period and an opportunity for the City to discuss the proposed remedial action with the new administration. USEPA has designated all documents pertaining to the "legal necessity" to spend \$25.4 million more to dredge the Harbor as "confidential". The administrative record is silent on the critical issues of the "future use" of the Harbor and purported "substantial public benefit" that will be derived from dredging the Harbor. USEPA nevertheless states that, "The Record contains supporting documentation, reports, analysis, studies and memoranda that set forth the basis for the proposed plan. For example, I draw your attention to the Region's 'Response to National Remedy Review Board Recommendations for the Waukegan Harbor Operable Unit of the Outboard Marine Corp. Superfund Site,' which is included in the Record. This document contains the Region's scientific, technical, and legal analysis of the recommendations made by EPA's National Remedy Review Board for the proposed cleanup action at the Waukegan Harbor site. We believe that this plan itself and at the public meeting held on November 13, 2008, provide the public with ample information on which to comment on the proposed plan."

**Example of Economic Benefit (Property Taxes Only)**  
**Mixed Use Development**  
**Harbor Front and North Harbor**

Development Area	Use	Sq. Ft.	Unit	Units	Unit Price	Value	Assessed Value	Tax Rate	Property Taxes by Dev. Segment	Total Property Taxes	2007 Property Taxes	Net Economic Benefit (Property Taxes Only)
Harbor Front (Block HF8)	3-Flat Residential	36,000		10	225,000	\$2,250,000	\$742,500	0.09	\$66,825			
	1-Multi Family Residential	19200		16	185,000	\$2,960,000	\$976,800	0.09	\$87,912			
	Marina/museum/retail	20,000		1	\$5,000,000	\$0	\$0	0.09	\$0	\$154,737	\$49,296	\$105,441
Harbor Front (Block H15)	3-Flat Residential	36000		10	\$225,000	\$2,250,000	\$742,500	0.09	\$66,825			
	1-Multi Family Residential	40000		30	\$185,000	\$5,550,000	\$1,831,500	0.09	\$164,835	\$231,660	\$0	\$231,660
Entire North Harbor (including Block NH1)	Residential/Commercial	20.25 Acres Useable		546	\$200,000	\$109,200,000	\$36,036,000	0.09	\$3,243,240	\$3,243,240	\$113,521	\$3,129,719
											<b>Total Net Economic Benefit</b>	<b>\$3,466,820</b>

**NOTES:**

**Note 1:** Density calculations offered only to illustrate the economic benefit (increase in property taxes) associated with mixed use (post-industrial) development in the Harborfront and North Harbor areas identified in the March 2005 Design Guidelines. Nothing herein should be construed as stating the official position by the City in connection with the any pending development or any development proposal that may be presented to the City in the future. In the event of a conflict between this illustration and applicable requirements, including, but not limited to, the Master Plan, Design Guidelines and the Zoning Code, applicable standards control. The density and uses in this illustration may not conform precisely to applicable standards. These calculations are also not intended to describe the full extent of the economic development benefits (real estates taxes, sales taxes, construction jobs, etc.) that will be derived from the complete redevelopment of the lakefront as contemplated by the Master Plan.

**Note 2:** "Marina/museum/retail" assumed to be publicly owned and exempt from real estate taxes.

**Note 3:** Block H15 is currently publicly owned and does not pay real estate taxes.

**Table 1**

February 4, 2009 City Comment Letter